96-351

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ANDREW L. COOK, individually and d/b/a ANDY COOK'S TRUCK STOP, and JEANNETTE COOK, individually and d/b/a ANDY COOK'S TRUCK STOP,

Petitioners,

vs.

THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ARTHUR J. SIEGEL, ESQ.
BOND, SCHOENECK & KING, LLP
Office & P.O. Address
111 Washington Avenue
Albany, New York 12210-2280
(518) 462-7421

95 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether valid and existing Treaties between the Six Nations and the United States preclude the United States from imposing Federal motor fuel excise tax on the Cooks' sale of motor fuel on Onondaga Nation land.

2. Whether the granting of summary judgment was inappropriate in a dispute concerning treaty interpretation where substantial, undisputed historical evidence was submitted and the United States relied solely upon an inapposite court decision to support its motion.

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OPINION BELOW

The judgment and opinion of the United States Court of Appeals for the Federal Circuit was entered June 6, 1996 (Docket No. 95-5074) 86 F.3d 1095. The opinion is contained in the Appendix at page A-1.

The appeal to the Federal Circuit was from an order and judgment of the United States Court of Federal Claims, the Honorable Robert H. Hodges, Jr., presiding, filed February 6, 1995 (No. 93-496T) 32 Fed. Cl. 170.The order and judgment are contained in the Appendix at page A-9. The opinion upon which the order and judgment is based was filed September 30, 1994 and is contained in the Appendix at page A-12.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered June 6, 1996 (Docket No. 95-5074). (A-8)

This court has jurisdiction to review this writ pursuant to Title 28, United States Code, Section 1254(1) and Rule 10, Rules of the Supreme Court of the United States.

STATUTES INVOLVED

The following treaties are relevant to this Petition for Writ of Certiorari:

Treaty with the Six Nations, 1784 (A-22) which states, in part:

> The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they

choose to sell the same to the people of the United States, who have the right to purchase.

Treaty with the Six Nations, 1789 (A-25) which states, in part: "The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled."

Treaty with the Six Nations, 1794 (A-31) which states, in part: "[A]nd then they shall be secured in the possession of the lands they inhabit . . . ."

STATEMENT OF THE CASE

The Cooks are members of the Onondaga Indian Nation, one of the Six Nations. During all relevant tax periods, the Cooks have resided on the Onondaga Nation Territory in Nedrow, New York, a sovereign nation surrounded by what is now New York State. During the relevant tax periods, the Cooks operated a diesel fuel business on property located on the Onondaga Nation, adjoining Interstate 81.

On or about December 30, 1992, the United States assessed excise, lust and environmental taxes and interest against the Cooks, based upon the alleged sale of diesel fuel by the Cooks at their truck stop. The taxable periods for which tax was assessed were from January, 1986 through December, 1987.

On or about January 19, 1993, the Cooks paid a divisible portion of these taxes under protest and without prejudice. The partial payment of these taxes was made solely to commence the instant action, filed August 6, 1993, for a refund and a declaration that the Cooks are not liable for the taxes assessed due to their status as members of the Onondaga Nation, and are exempt from these taxes based upon the treaties referenced at pages 1 and 2, supra, which grant to the Cooks free use and enjoyment of their sovereign land without interference from the United States.

On March 15, 1994 the United States filed a motion for partial summary judgment, addressing only the issue of whether the Treaties cited by the Cooks in the first cause of

action in the complaint exempt the Cooks from payment of motor fuel excise tax. The Cooks cross-moved for summary judgment on the grounds that there was no question of fact that the sale of fuel should be tax-exempt.

By Opinion dated September 30, 1994, the Honorable Robert H. Hodges granted the United States' motion for summary judgment and denied the Cooks' motion (A-12), holding that the treaties did not exempt the Cooks from paying excise tax. An order and judgment to that effect were entered on February 3, 1995 and February 6, 1995 respectively. (A-9) On March 21, 1995, a notice of appeal to the United States Court of Appeals for the Federal Circuit was duly filed. By judgment and opinion dated and entered June 6, 1996, the United States Court of Appeals for the Federal Circuit affirmed the Federal Claims Court order and judgment. (A-1-A-8)

ARGUMENT

I. THE COOKS SHOULD BE EXEMPT FROM PAYING FEDERAL EXCISE TAX ON THEIR SALE OF MOTOR FUEL ON SOVEREIGN INDIAN LAND

Since the United States Has Failed to Submit Evidence Creating a Factual Dispute, the Cooks' Cross-Motion for Summary Judgment Should Have Been Granted

In view of the uncontroverted evidence demonstrating that the Cooks are entitled to a refund of excise taxes paid, the Cooks were entitled to summary judgment. Through the submission of Dr. Starna's report and affidavit (A-40-A-77), the Cooks have discharged their burden of demonstrating the absence of an issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Eel River Sawmills, Inc. v. United States*, 27 Cl. Ct. 604, 607 (1993). "Facts set forth in affidavit form are properly before the court, and, if uncontested . . . can be accepted by the court. In the absence of affidavits of countering evidentiary material . . . the court accepts as true

the factual statements in [movant's] affidavits." *Eagle Aviation, Inc. v. United States*, 9 Cl. Ct. 128, 131 n.2 (1985).

Nothing submitted by the United States in support of its motion for summary judgment contravened the Cooks' expert's affidavit and, accordingly, it was incumbent upon the United States to come forward with evidence sufficient to show that a genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 at 322 (1986); *Matsushita Elec. Ind. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Bayou Land & Marine Contractors, Inc. v. United States*, 23 Cl. Ct. 764, 768 (1991). Having nothing with which to oppose the Cooks' cross-motion for summary judgment, the United States was in a "perilous position" absent submission of evidence countering the Cooks' expert's affidavit. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 159-61 (1970). The United States' failure to controvert any facts proffered by the Cooks warranted summary judgment in favor of the Cooks by both the Court of Federal Claims and the Federal Circuit Court.

Remarkably, the Circuit Court ignored the undisputed historical evidence submitted, despite having the obligation to make a *de novo* review (A-5), and substituted its own judgment that the treaty language did not require exemption from taxation.

Treaties with Indians must be construed as the Indians understood them at the time. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 528 (1832), *overruled on other grounds*, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). If ambiguities exist in a treaty, they should be resolved in favor of the Indians, due to the natural disadvantage the Indians had in their bargaining with the United States. *Rosebud Sioux Tribe*, 430 U.S. 584 (1977). To understand the meaning of a treaty, "a court may look to the words of the treaties and the surrounding circumstances in determining the Government's intent." *Sokaogon Chippewa Community v. Exxon Corp.*, 805 F.Supp. 680 (E.D. Wis. 1992), *aff'd*, 2 F.3d 219 (7th Cir. 1993) *and cert. denied*, 510 U.S. 1196 (1994) (citing *Mattz v. Arnett*, 412 U.S. 481, 505 (1973)). The comprehensive

historical analysis conducted by Dr. Starna in his report and affidavit (A-40-A-77) demonstrates that the United States' intent was to recognize as sovereign the lands left to the Six Nations. Dr. Starna's objective treatment of the circumstances surrounding the signing of the Canandaigua Treaty indicates that the treaty language "free use and enjoyment" should be construed broadly to encompass freedom from taxation. The plain meaning of these words, in the historical context developed by Dr. Starna, leads to no other conclusion. As the court in *Worcester v. Georgia* stated:

> The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense . . . how the words of the treaty were understood by these unlettered people, rather than their critical meaning, should form the rule of construction.

31 U.S. at 582.

The Court in *Holt v. Commissioner*, 364 F.2d 38 (8th Cir. 1966), *cert. denied* 386 U.S. 931 (1967), held that an exemption in an Indian treaty may be found if it "contains language which can reasonably be construed to confer income exemptions." *Id.* at 40. The language in the Canandaigua Treaty more than amply meets this standard.

As Dr. Starna indicates, Commissioner Pickering's statements constitute admissions by the United States that it intended to be fully bound by the treaty as it relates to any interference with activities on sovereign Indian land, just as the Indians were bound not to tax or lay claim to lands in which the United States had an interest. (A-71-A-73) Interpretation of the treaty in any other way would permit the United States to "have its cake and eat it too." This fundamental injustice should not be tolerated, nor this double standard perpetuated.

The Cooks' submission of expert evidence, wholly uncontradicted by the United States, was sufficient to warrant summary judgment in the Cooks' favor.

The Circuit Court's failure to recognize this fundamental legal principle must be corrected by this Court and the proper standard applied. At the least, this Court should remand this case to the Circuit Court to acknowledge and consider the historical proof before substituting its uninformed judgment.

An Excise Tax Directly Restricts the Cooks in the Free Use and Enjoyment of Their Sovereign Nation

The Circuit Court failed to address the critical distinction between income tax and excise tax, instead holding that excise tax relates to the sale of a commodity and not a "use" as contemplated under the Canandaigua Treaty (A-5-A-6). The Court, unable to cite a single excise tax case involving the Canandaigua Treaty, should, at the least, have permitted the presentation of factual evidence at trial with respect to the meaning of the Treaty as it pertains to excise tax.

Federal income tax is derived from Sections 1 and 61 of the Internal Revenue Code which permit the imposition of tax "from whatever source derived." The power to impose excise tax is not included within this broad definition. Rather, the only authority for the imposition of excise tax is in Article 1 Section 8 of the Constitution, which generally references the ability of Congress to impose excise.

Income tax is based upon an individual's acquisition of wealth. In contrast, an excise is a tax on the privilege of using property in a particular manner, whether or not any profit is made.

As the Supreme Court in *Bromley v. McCaughn*, 280 U.S. 124, 136 (1929) held, a tax imposed on a particular use of property is an excise. *See Miller Charitable Fund v. Commissioner*, 89 T.C. 1112, 1121 (1987). *See also Flint v. Stone Tracey Co.*, 220 U.S. 107 (1911) (an excise is a tax on doing

business); *overruled on other grounds*, *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985). *National Bank v. U.S.*, 101 U.S. 1 (1880) ("the [excise] tax thus laid is not on the obligation, but on its use in a particular way."). The imposition of this "use" tax on the Cooks' sale of motor fuel directly impedes the Cooks' free use of sovereign Indian land, as promised under the treaties.[1]

The United States' promise to grant the Onondagas "free use and enjoyment" of their land specifically precludes such a use tax, which, if permitted, would extinguish the Cooks' treaty-given right to use their land for the sale of motor fuel. The specific treaty language, combined with the "use" nature of the excise tax sought to be imposed and the objective historical findings, compel the conclusion that the Cooks are exempt from the motor fuel excise tax.[2]

II. SUMMARY JUDGMENT IS INAPPROPRIATE WHEN SUBSTANTIAL HISTORICAL EVIDENCE HAS BEEN SUBMITTED

Although the legal conclusions reached in *Lazore v. Commissioner of Internal Revenue*, 11 F.3d 1180 (3d Cir. 1993), an income tax case, are not at issue here, the procedure of allowing the presentation of historical testimony in the Claims Court to develop the facts in that case should have been

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[1] Unlike an income tax, the excise tax is directed solely at the use of Onondaga land for the sale of a particular product. This fact alone distinguishes this case from those where there is reliance upon the general power of the United States to tax individuals on their acquisition of wealth, which arguably applies irrespective of how or where the wealth was acquired. Logically, a sales activity on land is no more than the use of land for a particular purpose. This is just one example of how the Court stretched to reach its conclusion, failed to conduct any meaningful analysis and created a distinction where none exists. (A-5-A-6)

[2] It should be noted that the Court has permitted "environmental" and "lust " taxes against the Cooks. These are also "use" taxes, designed to punish motor fuel sellers for selling gasoline products, and equally prohibited under the specific treaty language relied upon by the Cooks.

applied by the Circuit Court. This crucial procedural issue was not even addressed by the Court when it decided the meaning of treaty language without the guidance of the undisputed historical evidence.

In *Lazore*, the Third Circuit affirmed a decision of the United States Tax Court which held that plaintiff members of the Mohawk Nation were not exempt from paying federal income taxes. The Tax Court framed the issue before it as "whether petitioners are exempt from paying Federal income tax because of their status as members of the Mohawk Nation . . . ." *Id.* at 183. In support of their claim, the *Lazore* plaintiffs submitted a "substantial amount of uncontradicted historical evidence concerning the Haudenosaunee understanding of the Treaty's meaning." *Lazore v. Commissioner of Internal Revenue*, *supra* at 1186. The United States argued that the issue had been decided previously, citing three Tax Court decisions in which summary judgment was granted against members of the Iroquois Confederacy.[3] The Tax Court, rejecting this approach, stated:

> All three cases were decided against the taxpayers upon respondent's motion for summary judgment, and *in each case the taxpayers relied solely upon the written language of one or more of the treaties referred to above*. In the case at bar we heard evidence of both a historical and contemporary nature respecting the meaning of the written language included in these treaties as understood by the Iroquois.

Lazore v. Commissioner, *supra* at 185.

The Tax Court in *Lazore* expressly acknowledged that the language relied upon by the plaintiffs had *already* been considered in prior decisions. However, since historical evidence

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[3] *Maracle v. Commissioner*, [Dec. 47,211(M)],T.C. Memo. 1991-98; *George v. Commissioner*, [Dec. 45,907(M)], T.C. Memo 01; *Nephew v. Commissioner*, [Dec. 45,436(M)], T.C. Memo. 1989-32.

was tendered by an expert, factual development at trial was required.

The Cooks have tendered uncontradicted historical evidence of an even more substantial nature than what was offered in *Lazore*. Accordingly, the Cooks should have been permitted to submit this evidence to a fact finder.[4]

When faced with a motion for summary judgment, the Court is charged with determining whether a genuine issue for trial exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Composite Laminates, Inc. v. United States*, 27 Cl. Ct. 310, 315 (1992). A genuine issue of material fact is one that affects the litigation's outcome. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248; *Hawaiian Bitumuls & Paving v. United States*, 26 Cl. Ct. 1234, 1239 (1992). The evidence submitted by the Cooks in opposition to the United States' motion for partial summary judgment created many such issues. The Circuit Court as well as the Claims Court ignored this factual presentation, thus improperly rendering their decisions in an historical vacuum. This Court should require the Circuit Court to examine and evaluate the historical evidence and render a studied decision based upon this information and not upon preconceived and unsupported notions.

III. BY RELYING UPON A SINGLE, INAPPOSITE COURT DECISION IN SUPPORT OF ITS DECISION GRANTING THE UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT, THE COURT ERRED IN DETERMINING THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTS

Summary judgment is appropriate only where no genuine issue of material fact exists. Fed. R. Civ. P. 56. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The United States bears the burden of demonstrating the absence of an issue of

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[4] The Claims Court acknowledged that no contrary evidence was presented. (A-19)

material fact. *Eel River Sawmills, Inc. v. United States*, *supra* at 607. Absent an affirmative showing, the United States may still meet its burden by showing that there is no evidence supporting the Cooks' case. *Id.* (citing *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1563 (Fed. Cir. 1987)). Had the United States met its burden, the Cooks would have been obligated to provide evidence of a dispute regarding material facts. *Celotex Corp. v. Catrett*, 477 U.S. at 325.

In support of its motion for partial summary judgment, the United States did not submit a single shred of factual evidence. Instead, it provided proposed findings of undisputed fact and a brief and an appendix containing a Third Circuit decision which it argued was dispositive of the case. The United States may not rely solely upon a court decision, decided on different facts by a different court, to meet its substantial burden. The Cooks, by providing concrete evidence, including the affidavit and report of William A. Starna, Ph.D., have not only refuted the United States' bare contentions, but have demonstrated that the United States has no authority to impose excise tax on the Cooks' activities on sovereign Onondaga land. Finally, even assuming, *arguendo*, that the United States had met its initial burden, the Cooks' evidence demonstrated the existence of a dispute concerning a genuine issue of material fact, precluding summary judgment.

The Circuit Court, in its decision, did not consider the Cooks' burden of proof, but instead substituted its own judgment and facts to conclude that the Treaties relied upon by the Cooks did not provide an exemption. The Claims Court, upon which the Circuit Court apparently relied, departed from the facts actually presented and summarily held that the treaty language could not have meant freedom from excise taxation.[5] However, the record reveals that the only historically

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[5] For instance, the Claims Court stated that "the record suggests the Onondagas were a defeated nation in 1776;...the Onondagas were not on equal ground with the United States, as plaintiffs assert". (A-20) There is nothing in the record to support this contention. The only record evidence is to the contrary. (A-41, 72)

correct interpretation of the treaties was consistent with a finding that the Indians were exempt from taxation. (A-45-A-77)

The Court, in granting summary judgment, has ignored the most significant factual issue in this case: the detailed historical evidence submitted by the Cooks showing that the Onondaga treaty meant what is said: that the Onondaga, including the Cooks, were able to use their land free of United States interference, including taxation.

Dr. Starna's report and affidavit, and the conclusions contained therein, are not the product of theoretical speculation or unsupported assumptions, but are premised upon facts developed by exhaustive examination of actual correspondence between the parties to the Canandaigua Treaty and communications within the United States Government. Specifically, Dr. Starna states that the Canandaigua Treaty is unlike any other treaty between the United States and an Indian people because it explicitly acknowledged the equality of the Six Nations and the United States. This conclusion is founded upon facts contained in United States' Indian Commissioner Timothy Pickering's own papers, as well as the language selected by the parties to the treaty. Further, Dr. Starna compared the language of the Canandaigua Treaty to other federal treaties between the United States and Indian peoples, and concluded that no other treaty contained similar language. (A-73)

The use of expert affidavits to create issues of fact precluding summary judgment is routinely permitted. *See, e.g., Manning Elec. & Repair Co., Inc. v. United States*, 22 Cl. Ct. 240, 245 (1991) (plaintiff, through averments in plaintiff's expert's affidavits, "created an issue of fact as to whether [a contract] specification is proprietary."). The historical evidence presented by the Cooks sufficiently demonstrated the existence of an issue of fact such that summary judgment should have been denied.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF JUDGMENT ACCOMPANIED BY OPINION

OPINION FILED AND JUDGMENT ENTERED: 06/06/96

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing in banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the Appellant(s) in favor of the Appellee(s) under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should be made to the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties, payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

FRANCIS X. GINDHART
Clerk

cc: ARTHUR JOHN SIEGEL
GARY R. ALLEN

COOK V US, 95-5074
CFC - 93-496T

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BOND, SCHOENECK
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United States Court of Appeals for the Federal Circuit

95-5074

ANDREW L. COOK, individually and d/b/a ANDY COOK'S TRUCK STOP, and JEANETTE COOK, individually and d/b/a ANDY COOK'S TRUCK STOP,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: June 6, 1996

Before ARCHER, *Chief Judge*, LOURIE, and SCHALL, *Circuit Judges*.

ARCHER, *Chief Judge*.

DECISION

Andrew and Jeanette Cook (the Cooks) appeal the February 6, 1995 judgment of the Court of Federal Claims, No. 93-496 T, dismissing the Cooks' complaint and granting the United States' counterclaim for payment of excise tax. We affirm.

BACKGROUND

Andrew and Jeanette Cook are members of the Onondaga Indian Nation. The Cooks own and operate a diesel fuel truck stop along Interstate 81 within the Onondaga Indian Reservation. In 1986 and 1987, the Cooks purchased approximately twelve million gallons of diesel fuel from distributors in Canada which they in turn sold to operators of diesel fuel vehicles. The Cooks did not pay excise tax on the sale of this diesel fuel as required by 26 U.S.C. § 4041(a) (1994). In

1992, the Internal Revenue Service (IRS) assessed excise, LUST[1] and environmental taxes and interest against the Cooks for the 1986 87 tax periods. In 1993, the Cooks made partial payment and commenced this suit in the Court of Federal Claims for a refund claiming that they are not liable for the assessed taxes. The government has counterclaimed for the balance of the excise and other taxes and interest assessed.

The Cooks claim that they are exempt from paying federal excise tax by treaties between the Onondaga Nation and the United States. In particular, they cite the Fort Stanwyx Treaty, 7 Stat. 15 (1784) which states that the Indian Nations "shall be secure in the peaceful possession of the lands they inhabit"; the Treaty of Fort Hamar, 7 Stat. 33 (1789) which states that the Indian Nations "shall be secure in the possession of the lands they inhabit"; and the Canandaigua Treaty, 7 Stat. 44 (1794) which states that the land reserved to the Onondaga Indian Nation is their property and that the United States will never disturb them "in the free use and enjoyment thereof." The Cooks contend that pursuant to these treaties they are exempt from the payment of excise tax. The Court of Federal Claims carefully considered each of these treaties and concluded that they cannot reasonably be construed as conferring as exemption from federal excise tax.

The Court of Federal Claims held that the treaty language pertains to the use of land, and that the excise tax in question taxes a particular activity, not the land itself or the Cooks' use of the land. For this reason, the Cooks' contention, that they are exempt from paying excise tax by the Supreme Court's decision in *Squire v. Capoeman*, 351 U.S. 1 (1956), likewise failed. In *Capoeman*, the Supreme Court held that the General Allotment Act exempted Indian income which was derived directly from the land from federal income tax. 351 U.S. at 7-8. The Court of Federal Claims held that the *Capoeman*

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[1] Leaking Underground Stornage Tank (LUST) taxes are assessed pursuant to 26 U.S.C. § 4041 (d) for the storage of diesel fuel in underground storage tanks.

exemption only applies to land allotted under the General Allotment Act and there was no showing in this case that the Cook's land is so restricted. In addition, the Court of Federal Claims found that the income from the operation of a gas station is not income derived directly from the land as required by *Capoeman*. Therefore, the Court of Federal Claims held that the Cooks are required to pay federal excise tax and granted the government's motion for partial summary judgment. The Cooks now appeal that judgment to this Court.

DISCUSSION

I.

We review the Court of Federal Claims' grant of summary judgment under a de novo standard of review, with all justifiable factual inferences being drawn in favor of the party opposing summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The underlying questions of treaty interpretation are questions of law which we also review de novo. *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1408 (9th Cir. 1995); *Yapp v. Reno*, 26 F.3d 1562, 1565 (11th Cir. 1994).

In the absence of a clear expression to the contrary, general acts of Congress apply to Indians, like all other citizens. *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116, 120 (1960). As the Supreme Court held in *Squire v. Capoeman*, 351 U.S. 1, 6 (1956), Indians "are subject to the payment of income taxes as are other citizens. . . . [T]o be valid, exemption to tax laws should be clearly expressed." Although this general rule was applied specifically to income tax,the rule applies equally to the federal excise tax in question. The excise tax for the sale of diesel fuel is imposed upon any person who sells to an owner, lessee or operator of a diesel powered vehicle. 26 U.S.C. § 4041(a) (1994). The Court of Federal Claims properly found that "any person" includes Onondaga Indians.

While it is true the treaty rights secured to the Indians by agreement with the government are to be liberally construed,

Red Lake Band v. United States, 17 Cl. Ct. 362, 381 (1989), and that the Indians' understanding of an agreement informs the court's interpretation, *Peoria Tribe of Indians v. United States*, 390 U.S. 468, 472-73 (1968), there is no language in the treaties cited which could be construed as conferring an exemption from federal excise tax. Absent a definitely expressed exemption, Indians, like all other United States citizens, are subject to federal taxation. We recognize that if there are ambiguities in treaty language, they should be resolved in favor of the Indians. *See Rosebud Sioux Tribe*, 430 U.S. 584 (1977). But, we cannot create ambiguities where none exist. Neither the Canandaigua Treaty, the Fort Stanwyx Treaty nor the Treaty of Fort Hamar contains any language which confers an exemption from excise tax or presents an ambiguity which could be resolved in favor of conferring such an exemption.

Contrary to the Cooks' contentions, the Canandaigua Treaty which grants the Indians "free use and enjoyment" of their land cannot reasonably be interpreted as exempting them from the payment of excise tax. This, like the other treaty provisions at issue which secure the Indians "peaceful possession" of their land, applies to the use of land. Federal excise tax is a tax on the sale of a commodity. As the Court of Federal Claims correctly held, the federal excise tax is a tax on the particular activity of selling diesel fuel, not a tax on the use of the land. Consequently, these treaty provisions do not exempt the Cooks from the assessed excise taxes and the Court of Federal Claims properly granted partial summary judgment in favor of the government.

II.

The Cooks also assert that *Squire v. Capoeman* exempts them from federal excise tax. We disagree. In *Capoeman*, the Supreme Court held that income derived directly from land allotted under the General Allotment Act of 1887 was exempt from income tax. 351 U.S. at 7-8. *Capoeman* does not apply in this case because the excise tax on diesel fuel is not a tax on income derived directly from the land. The *Capoeman* rule

only exempts income from activities that exploit the land, such as the sale of timber from the Indian land. It does not apply to a taxable sale of a commodity that merely taken place on Indian land.[2] Therefore, the Court of Federal Claims properly held that the Cooks were not exempt from the payment of excise tax on diesel fuel under the rationale of the Supreme Court's decision in *Capoeman*.

CONCLUSION

The Court of Federal Claims' grant of summary judgment in favor of the United States is affirmed.

AFFIRMED.

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[2] In this case we do not need to decide whether a showing that the land is restricted or allotted is required when a treaty exemption or income derived directly from the land is otherwise applicable.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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95-5074

ANDREW L. COOK, individually and
d/b/a ANDY COOK'S TRUCK STOP, and
JEANETTE COOK, individually and
d/b/a ANDY COOK'S TRUCK STOP,

Plaintiffs/Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

Judgment

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS

in CASE NO(S). 93-496T

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: **AFFIRMED**

ENTERED BY ORDER OF THE COURT

DATED JUN 06 1996

/s/ Francis X. Gindhart

Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: July 29, 1996

In the United States Court of Federal Claims

* * * * *

ANDREW L. COOK, individually and doing business as ANDY COOK'S TRUCK STOP, and JEANETTE COOK, individually and doing business as ANDY COOK'S TRUCK STOP,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

* * * * *

No. 93-496 T
Filed: February 3, 1995

ORDER

Defendant is entitled to judgment on its counterclaim for the reasons stated in the September 30 opinion of this court. Defendant seeks $1,769,218.10 of assessed excise tax and $1,344,046.75 of assessed interest, plus statutory interest and additions as provided by law.

Plaintiffs were given an opportunity to contest the amount of the counterclaim, but now advise the court that they have no evidence that the IRS assessments are inaccurate. The certificate of assessments and payments is presumptive proof of a valid assessment where taxpayer produced no evidence to counter the presumption. *Rocovich v. United States*, 933 F.2d 991, 994 (Fed. Cir. 1991), citing *United States v. Dixon*, 672 F.Supp. 503, 506 (M.D. Ala. 1987), *aff'd per curiam*, 849 F.2d 1478 (11th Cir. 1988).

The Clerk will dismiss plaintiff's complaint and enter judgment on defendant's counterclaim in the amount of

$3,113,264.85, plus statutory interest and additions as provided by law. No costs.

/s/ Robert H. Hodges, Jr.

Robert H. Hodges, Jr.
Judge

In the United States Court of Federal Claims

No. 93-496 T

ANDREW L. COOK INDIVIDUALLY AND DOING BUSINESS AS ANDY COOK'S TRUCK STOP, AND JEANETTE COOK, INDIVIDUALLY AND DOING BUSINESS AS ANDY COOK'S TRUCK STOP,

v.

THE UNITED STATES

JUDGMENT

FILED FEB 6 1995

Pursuant to the court's order of February 3, 1995,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff's complaint is dismissed, and defendant recover on its counterclaim, of and from plaintiff, the sum of $3,113,264.85, plus statutory interest and additions as provided by law. No costs.

David A. Lampen
Clerk of Court

February 6, 1995 By: /s/ ????????????

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of *all plaintiffs*. Filing fee is $105.00.

In the United States Court of Federal Claims

No. 93-496 T

(Filed: September 30, 1994)

* * * * * *

ANDREW L. COOK, individually and doing business as ANDY COOK'S TRUCK STOP, and JEANETTE COOK, individually and doing business as ANDY COOK'S TRUCK STOP,	*	Excise taxes on fuel; Indian treaties; fuel business on Indian land taxable; I.R.C. §§ 4041(a), (d), 4611.
Plaintiffs,	*	
v.	*	
UNITED STATES OF AMERICA,	*	
Defendant.	*	

* * * * * *

Arthur J. Siegel, Albany, New York, for plaintiffs.

Elizabeth K. Wickstrom, United States Department of Justice, Washington, D.C., for defendant.

OPINION

HODGES, Judge.

Plaintiffs seek a refund for taxes paid to the IRS. This court has jurisdiction pursuant to 28 U.S.C. § 1491 (a)(1)(1988). The Government has counterclaimed for taxes allegedly owed by plaintiffs. The principal issue is whether treaties between the Onondaga Nation and the United States exempt Onondaga Indians from paying federal excise taxes on the importation, storage, and sale of diesel fuel.

Both parties have moved for summary judgment on the issue of liability. The facts are not in dispute, and treaty interpretation is a matter of law. We grant defendant's motion for partial summary judgment and deny plaintiffs' motion.

FACTS

Plaintiffs Andrew and Jeanette Cook are members of the Onondaga Indian Nation, which is part of a confederacy of Indian tribes known as the Haudenosaunee, Iroquois, or Six Nations Confederacy of Indians (Six Nations). The Cooks own and operate Andy Cook's Diesel Truck Stop, a diesel fuel business located along Interstate 81 in Nedrow, New York. The truck stop is within the Onondaga Indian Reservation.

In 1986 and 1987, the Cooks purchased approximately twelve million gallons of diesel fuel from distributors in Canada and sold it to owners and operators of vehicles that consume diesel fuel. The excise taxes were not included in the pump price.

The Cooks did not pay the excise taxes for the sale, storage, and importation of diesel fuel. In 1992, the IRS assessed the following amounts of taxes owed by plaintiffs for their business activities during 1986 and 1987: $1,754,306 for the sale of diesel fuel pursuant to I.R.C. § 4041(a); $7,950 in Leaking Underground Storage Tank (LUST) taxes for the storage of diesel fuel in underground storage tanks pursuant to I.R.C. § 4041(d); and $7,034 in environmental taxes for petroleum products which enter the United States pursuant to I.R.C. § 4611. In addition, IRS demanded $1,344,094.93 interest. Mr. and Mrs. Cook paid under protest a divisible portion equal to $71.90 and $48.18 of the total excise tax assessment and interest, respectively. At the same time, the Cooks filed a claim for a refund with the IRS, contending that the Fort Stanwyx Treaty of 1784, the Fort Hamar Treaty of 1789, and the 1794 Treaty at Canandaigua, between the Onondaga Nation and the United States, exempt them from paying federal excise taxes.

The IRS rejected the refund claim. The Cooks then filed their complaint in this court asking for a refund and a declaratory judgment that they are exempt from federal excise taxes on the importation, storage, and sale of diesel fuel. The Cooks point to three treaty provisions:

1. "[The Six Nations] shall be secured in the peaceful possession of the lands they inhabit" in Article III of the Fort Stanwyx Treaty, 7 Stat. 15 (1784).

2. "[The Six Nations] shall be secured in the possession of the lands they inhabit" in Article I of the Treaty of Fort Hamar, 7 Stat. 33 (1789).

3. The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations. . . to be their property; and the United States will never claim the same, nor disturb them. . . in the free use and enjoyment thereof. . . .

Article II of the Canandaigua Treaty, 7 Stat. 44 (1794). The Cooks contend that the excise taxes violate the terms of the treaties by interfering with the free use of their property.

DISCUSSION

Plaintiffs assert that they are not citizens of the United States and that they are exempt form paying federal excise taxes. Six Nations does have characteristics of an autonomous, independent nation, and many members of the tribes which comprise the Six Nations consider themselves not to be citizens of the United States. *Lazore v. Commissioner of Internal Revenue*, 11 F.3d 1180, 1182 (3d Cir. 1993). However, Onondaga Indians are citizens of the United States. *Ex parte Green*, 123 F.2d 862,864 (2d Cir. 1941), *cert. denied sub nom. Green v. McLaren*, 316 U.S. 668 (1942); *see also Squire v. Capoeman*, 351 U.S. 1, 6 (1956) (holding that Indians are United States citizens); *United States v. Neptune*, 337 F. Supp. 1028, 1030 (D. Conn. 1972).

"[A] general statute in terms applying to all persons includes Indians and their property interests." *Federal Power*

Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960). "[G] eneral Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary. . ."*Id.* at 120. The Supreme Court has yet to hold a federal tax applied to Indians as being unconstitutional. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 845 F.2d 139, 143 (7th Cir. 1988). *See e.g., Lazore*, 11 F.3d at 1187-88; *see also,* Felix S. Cohen, Handbook of Federal Indian Law 389 (1982) ("[T]he constitutional reference to 'Indians not taxed' is irrelevant to that inquiry except as an oblique reference to the historical point of beginning, when Indians were not subject to any ordinary laws save those of their tribes.").

The Court stated in *Capoeman* that "Indians are citizens and. . .in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens. . . .[T]o be valid, exemptions to tax laws should be clearly expressed." *Capoeman*, 351 U.S. at 6. "Indians, like all other citizens, are subject to federal income tax unless some provision of a statute or a treaty expressly and specifically confers an exemption." *Critzer v. United States*, 220 Ct. Cl. 43, 48, *cert. denied,* 444 U.S. 920 (1979).

Although this general rule refers to exemption from federal income taxes, the rule is also valid for exemption form federal excise taxes. *See Confederated Tribes of Warm Springs Reservation v. Kurtz,* 691 F.2d 878 (9th Cir. 1982) (wherein the court applied this principle to determine whether Indian confederation was subject to federal excise tax), *cert. denied sub nom. Confederated Tribes of Warm Springs Reservation v Egger*, 460 U.S. 1040 (1983); *Lac Courte Oreilles Band*, 845 F.2d at 143 (reasoned in dictum that rationale underlying exemption from income tax for Indians could also apply to exemption from manufacturer's federal excise taxes). The status of being Onondaga Indians does not automatically exempt plaintiffs from their obligation to pay federal taxes.

"Tax exemptions, even those affecting Indians, are not granted by implication. Rather, if Congress intends to exempt certain income, it must do so by a definite expression." *Critzer*, 220 Ct, Cl. at 55 (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 156 (1973); *Capoeman*, 351 U.S. at 6; *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598,606-07 (1943)).

The excise tax for the sale of diesel fuel is imposed on *any person* who sells to an owner, lessee, or operator of a diesel-powered highway vehicle. I.R.C. § 4041(a)(1)(A). The LUST tax is imposed on any person who is covered by section 4041(a)(1)(A). I.R.C. § 4041(d). As stated above, "any person" includes Onondaga Indians.

Plaintiffs maintain that I.R.C. § 7871 exempts them from paying the sales tax. However, plaintiffs do not quality for this exemption because 1) they are neither an Indian tribal government nor a subdivision thereof, 2) the sale of fuel by plaintiffs did not involve a State or a political subdivision thereof, and 3) the sale of fuel by plaintiffs did not involve the exercise of "an essential governmental function" as defined in subsection (e). 26 U.S.C. § 7871(a)(2)(A), (b), (d), (e)(1987). The Ninth Circuit court reached the same conclusion in *Warm Springs* when it held that Indians who operated a sawmill on a reservation were not exempt from paying the section 4041 (a) fuel tax. *Warm Springs*, 691 F.2d at 880-81; *Lac Courte Oreilles Band*, 845 F.2d, at 143-44.

Plaintiffs also assert that *Capoeman* exempts them from the excise taxes. *Capoeman* states that the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 331 et seq, exempts an Indian's income, derived directly from his or her allotted and restricted land, from income taxation. *Capoeman*, 351 U.S. at 7-8. However, this rule applies only to Indians who hold allotted land under a trust patent and who may not alienate or encumber that land without the consent of the United States. *Id.* at 8-10 n. 15, n. 19; *United States v. Anderson*, 625 F.2d 910, 914 (9th Cir. 1980), *cert. denied*, 450 U.S. 920 (1981). None of the briefs submitted by either side states whether plaintiffs'

land is restricted. Plaintiffs have not explained why, after insisting that excise taxes be treated differently from income tax, the rule in *Capoeman* should be applied to excise taxes. Nevertheless, even if the *Capoeman* rule does apply in this case, it would not exempt plaintiffs from the excise taxes. This is because income from operation of a gas station is not considered to be income derived directly from the land. *Saunooke v. United States*, 9 Cl. Ct. 537,541-44, *aff'd*, 806 F.2d 1053 (Fed. Cir. 1986); *see also Critzer*, 220 Ct. CL. at 51-52 (income from motel, restaurant, and gift shop on possessory holding is taxable); Rev. Rul. 56-342, 1956-2 C.B. 20; *Dillon v. United States*, 792 F.2d 849, 855-56 (9th Cir. 1986), *cert. denied sub nom. Cross v. United States*, 480 U.S. 930 (1987).

"[W]hile in general tax exemptions are not to be presumed and the statutes conferring them are to be strictly construed, tax exemptions secured to the Indians by agreement between them and the Government are to be liberally construed." *Landman v. United States*, 109 Ct. Cl. 1, 14-15 (citations omitted), *cert.denied*, 332 U.S. 815 (1947); *Red Lake Band v. United States*, 17 Cl. Ct. 362, 381 (1989). In addition, "[f]ederal agreements with Indians draw their meaning from representations by Government agents to the Indians, as well as from the Indians' own understanding." *United States v. Oneida Nation*, 217 Ct. Cl. 45, 57-58 (1978). Agreements between the Indians and the United States "are to be read as the Indians understood and would naturally understand them." *Gila River Pima-Maricopa Indian Community v. United States*, 199 Ct. Cl. 586, 593 (9172) (citing *Peoria Tribe of Indians v. United States*, 390 U.S. 468, 472-73 (1968)).

There are limits to liberal construction of Indian treaties, however. "[E]ven though 'legal ambiguities are resolved to the benefit of the Indians,' courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' clearly runs counter to a tribe's later claims." *Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) (citations omitted). Tax exemptions can be granted only if the treaties contain language that can be

reasonably construed as conferring such exemptions. *Lazore*, 11 F.3d at 1185; *Dillon*, 792 F.2d at 853; *Holt v. Commissioner of Internal Revenue*, 364 F.2d 38, 40 (8th Cir. 1966), *Cert. denied*, 386 U.S. 931 (1967).

We will not follow the more restrictive rule of interpretation employed in *Warm Springs* which demanded a "definite expressed exemption" in a treaty. *See Warm Springs*, 691 F.2d at 882. This is because the court in *Warm Springs* cited the "definitely expressed exemption" requirement from *Mescalero* despite the fact that the Court in *Mescalero* applied the rule to interpret a statute and not a treaty. *Lazore*, 11 F.3d at 1185 n. 2.

Article III of the Fort Stanwyx Treaty was analyzed in *Six Nations v. United States*, 173 Ct. Cl. 899 (1965). After examining historical evidence, the *Six Nations* court concluded that the phrase "they shall be secured in the peaceful possession of the lands they inhabit" means no more than that the United States would not take for itself lands which belong to the Six Nations. *Id.* at 906. The issue in *Six Nations* was very different from the one in this case, but we find that the United States Court of Claims' interpretation applies because the phrase clearly refers to ownership of land. One could argue that excise taxes undermine the condition of being "secured in the peaceful possession"; however, such an interpretation goes beyond the limits of the rules of liberal construction outlined above.

A. Treaty Language

This case hinges on whether the phrase "disturb. . . in the free use and enjoyment [of land]" can reasonably be interpreted to mean freedom from federal excise taxes. The Government points to the Third Circuit decision in *Lazore* wherein the court held that the Canandaigua Treaty is not "capable of being reasonably construed as supporting an exemption from the income tax." *See Lazore*, 11 F.3d at 1187.

The treaty provision applies to the use of land. The excise statute in question taxes a particular activity, not the land

itself or the plaintiffs' use of the land. Plaintiffs' argument that the fuel tax is a tax on the use of their land fails to note this distinction.

The meaning of "free" is not limited to that of *gratis*. The sales, LUST, and environmental taxes do not preclude plaintiffs from using their land to sell diesel fuel. They are not precluded from engaging in any other activity on their land. Plaintiffs' argument that operating a gas station is the only activity for which their land can be used is not reasonable.

B. The Treaty as the Onondaga Indians Understood It

To show how the Onondagas who signed the treaties understood them, plaintiffs submitted a study of the history of the treaties between the Six Nations and the United States. William A. Starna, A Report on the 1784 to 1794 Treaty Period and the Six Nations Iroquois (Dec. 8, 1993) (unpublished manuscript). Dr. Starna and plaintiffs assert unequivocally that the Onondagas saw their nation as independent and equal to the United States. To support this claim, they point to the reciprocal language in Articles II and IV of the Treaty of Canandaigua and the fact that the Six Nations agreed in that treaty not to disturb the United States in its free use and enjoyment of its lands. Based on this language, Dr. Starna and Plaintiffs contend that the Onondagas expected to be left alone by the United States. They did not expect the United States to assess a tax on them, as the United States did not expect the Onondaga Nation to assess a tax on the United States.

The Government has not provided evidence to the contrary. Instead, it argues that the silence in the treaties as to excise taxes, a type of tax which already existed at the time, indicates that the treaty does to confer an exemption to the Indians. However, silence as to taxation in the treaties creates neither a right to impose taxes nor a prohibition against them. *Warm Springs*, 691 F.2d at 882.

The record suggests that the Onondagas were a defeated nation in 1776; the Indians were pressured to cede vast tracts of territory to the United States. The Onondagas were not on equal ground with the United States, as plaintiffs assert. In fact, the historical lack o Indians' bargaining power vis-a-vis the United States is one of the reasons the Supreme Court has stated that ambiguous treaties are to be interpreted in favor of Indians to compensate for that lack of power.

Given the historical context, the fact that the Indian signees may have understood the treaties to confer them and their descendants exemption from federal taxation is insufficient to overcome the language of a treaty which strongly suggests that the terms do not prohibit federal excise taxes. Viewed in historical context and given a fair appraisal, the plain language cannot reasonably be interpreted as prohibiting federal excise taxes on the sale of diesel fuel by Onondaga Indians on their land. *Accord Klamath Tribe*, 473 U.S. at 774.

C. Judicial Interpretation of Other Indian Treaties

Our standard of reasonableness is in accord with those adopted by other courts. In *Jourdain*, the Eighth Circuit concluded that it is reasonable to interpret a treaty's prohibition of "molestation from the United States" as meaning "interference with the rights of Indians to hunt and otherwise enjoy their land, *not* the 'right' to be free from federal taxation." *Jourdain v. Commissioner of Internal Revenue*, 617 F.2d 507, 509 (8th Cir.) (Emphasis added), *cert. denied*, 449 U.S. 839 (1980).

In *Dillon*, a treaty provided that "such assigned land. . .shall not be aliened or leased for a longer term than two years; shall be exempt from levy, sale or forfeiture. . .until a State Constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions." *Dillon*, 792 F.2d at 852. The Ninth Circuit in *Dillon* concluded that this restriction on alienation cannot reasonably be construed as

conferring a permanent federal income tax exemption for a business operated on treaty land. *Id.* at 854.

The Ninth Circuit has stated that the phrase "for the exclusive use and benefit of said confederated tribes and band of Indians" granted a federal income tax exemption so long as income was derived directly from reserved land. *Hoptowit v. Commissioner of Internal Revenue*, 709 F.2d 564, 566 (9th Cir. 1983). The Tax Court concluded that a treaty reserving "the right of taking fish, at all the usual and accustomed grounds and stations," does not establish a tax exemption for income derived from exercising the fishing rights guaranteed by the treaty. *Earl v. Commissioner of Internal Revenue*, 78 T.C. 1014,1017-18 (1982).

CONCLUSION

We hold that the Fort Stanwyx Treaty, the Fort Hamar Treaty, and the Treaty of Canandaigua cannot reasonably be construed to provide plaintiffs an exemption form their obligation to pay federal excise taxes on the import, storage, and sale of diesel fuel. Defendant's motion for partial summary judgment is GRANTED and plaintiffs' motion is DENIED.

TREATY WITH THE SIX NATIONS, 1784.

Oct. 22, 1784.

7 Stat., 15

Articles concluded at Fort Stanwix, on the twenty-second day of October, one thousand seven hundred and eighty-four, between Oliver Wolcott, Richard Butler, and Arthur Lee, Commissioners Plenipotentiary from the United States, in Congress assembled, on the one Part, and the Sachems and Warriors of the Six Nations, on the other.

The United States of America give peace to the Senecas, Mohawks, Onondagas and Cayugas, and receive them into their protection upon the following conditions:

ARTICLE I.

Hostages to be given till prisoners are delivered up.

Six hostages shall be immediately delivered to the commissioners by the said nations, to remain in possession of the United States, till all the prisoners, white and black, which were taken by the said Senecas, Mohawks, Onondagas and Cayugas, or by any of them, in the late war, from among the people of the United States, shall be delivered up.

ARTICLE II.

Possession of lands secured.

The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled.

ARTICLE III.

Boundaries.

A line shall be drawn, beginning at the mouth of a creek about four miles east of Niagara, called Oyonwayea, or Johnston's Landing-Place, upon the lake named by the Indians Oswego, and by us Ontario; from thence southerly in a direction always four miles east of the carrying path, between Lake Erie and Ontario, to the mouth of Tehoseroron or Buffaloe Creek on Lake Erie; thence south to the north boundary of the state of Pennsylvania; thence west to the end of the said north boundary; thence south along the west boundary of the said state, to the river Ohio; the said line from the mouth of the Oyonwayea to the Ohio, shall be the western boundary of the lands of the Six Nations, so that the Six Nations shall and do yield to the United States, all claims to the country west of the said boundary, and then they shall be secured in the peaceful possession of the lands they inhabit east and north of the same, reserving only six miles square round the fort of Oswego, to the United States, for the support of the same.

ARTICLE IV.

Goods given to the Indians.

The Commissioners of the United States, in consideration of the present circumstances of the Six Nations, and in execution of the humane and liberal views of the United States upon the signing of the above articles, will order goods to be delivered to the said Six Nations for their use and comfort.

Oliver Wolcott, [L.S.]
Richard Butler, [L.S.]
Arthur Lee, [L.S.]
Mohawks:
Onogwendahonji, his x mark, [L.S.]
Touighnatogon, his x mark, [L.S.]
Onondagas:
Oheadarighton, his x mark, [L.S.]
Kendarindgon, his x mark, [L.S.]
Senekas:
Tayagonendagighti, his x mark, [L.S.]
Tehonwaeaghrigagi, his x mark, [L.S.]
Oneidas:
Otyadonenghti, his x mark [L.S.]
Dagaheari, his x mark, [L.S.]
Cayuga:
Oraghgoanendagen, his x mark, [L.S.]
Tuscaroras:
Ononghsawenghti, his x mark, [L.S.]
Tharondawagon, his x mark, [L.S.]
Seneka Abeal:
Kayenthoghke, his x mark, [L.S.]

Witnesses:

Sam. Jo. Atlee,
Wm. Maclay
Fras. Johnston,
Pennsylvania Commissioners.
Aaron Hill,
Alexander Campbell,
Saml. Kirkland, missionary,
James Dean,
Saml. Montgomery,
Derick Lane, captain,
John Mercer, lieutenant,
William Pennington, lieutenant,
Mahlon Hord, ensign,
Hugh Peebles.

TREATY WITH THE SIX NATIONS, 1789.

Jan. 9, 1789.

7 Stat., 33.

Articles of a treaty made at Fort Harmar, the ninth day of January, in the year of our Lord one thousand seven hundred and eighty-nine, between Arthur St. Clair, esquire, governor of the territory of the United States of America, northwest of the river Ohio, and commissioner plenipotentiary of the said United States, for removing all causes of controversy, regulating trade, and settling boundaries, between the Indian nations in the northern department and the said United States, of the one part, and the sachems and warriors of the Six Nations, of the other part:

Reference to the treaty of Fort Stanwix.

ART. 1. WHEREAS the United States, in congress assembled, did, by their commissioners, Oliver Wolcott, Richard Butler, and Arthur Lee, esquires, duly appointed for that purpose, at a treaty held with the said Six Nations, viz: with the Mohawks, Oneidas, Onondaga, Tuscaroras, Cayugas, and Senekas, at fort Stanwix, on the twenty-second day of October, one thousand seven hundred and eighty-four, give peace to the said nations, and receive them into their friendship and protection: And whereas the said nations have now agreed to and with the said Arthur St. Clair, to renew and confirm all the engagements and stipulations entered into at the beforementioned treaty at fort Stanwix: and whereas it was then and there agreed, between the United States of America and the said Six Nations, that a

Renewal of engagements.

boundary line should be fixed between the lands of the said Six Nations and the territory of the said United States, which boundary line is as follows, viz: Beginning at the mouth of a creek, about four miles east of Niagara, called Ononwayea, or Johnston's Landing Place, upon the lake named by the Indians Oswego, and by us Ontario; from thence southerly, in a direction always four miles east of the carrying place, between lake Erie and lake Ontario, to the mouth of Tehoseroton, or Buffalo creek, upon lake Erie; thence south, to the northern boundary of the state of Pennsylvania; thence west, to the end of the said north boundary; thence south, along the west boundary of the said state to the river Ohio. The said line, from the mouth of Ononwayea to the Ohio, shall be the western boundary of the lands of the Six Nations, so that the Six Nations shall and do yield to the United States, all claim to the country west of the said boundary; and then they shall be secured in the possession of the lands they inhabit east, north, and south of the same, reserving only six miles square, round the fort of Oswego, for the support of the same. The said Six Nations, except the Mohawks, none of whom have attended at this time, for and in consideration of the peace then granted to them, the presents they then received, as well as in consideration of a quantity of goods, to the value of three thousand dollars, now delivered to them by the said Arthur St. Clair, the receipt whereof they do hereby acknowledge, do hereby

The Mohawks excepted.

renew and confirm the said boundary line in the words beforementioned, to the end that it may be and remain as a division line between the lands of the said Six Nations and the territory of the United States, forever. And the undersigned Indians, as well in their own names as in the name of their respective tribes and nations, their heirs and descendants, for the considerations beforementioned, do release, quit claim, relinquish, and cede, to the United States of America, all the lands west of the said boundary or division line, and between the said line and the strait, from the mouth of Ononwayea and Buffalo Creek, for them, the said United States of America, to have and to hold the same, in true and absolute propriety, forever.

Old boundary confirmed.

Lands west of said line ceded forever to United States.

ART. 2. The United States of America confirm to the Six Nations, all the lands which they inhabit, lying east and north of the before mentioned boundary line, and relinquish and quit claim to the same and every part thereof, excepting only six miles square round the fort of Oswego, which six miles square round said fort is again reserved to the United States by these presents.

Certain lands confirmed to the Six Nations, etc.

ART. 3. The Oneida and Tuscarora nations, are also again secured and confirmed in the possession of their respective lands.

Lands of Oneidas and Tuscaroras confirmed to them anew.

ART. 4. The United States of America renew and confirm the peace and friendship entered into with the Six Nations,

Peace and friendship renewed.

(except the Mohawks), at the treaty beforementioned, held at fort Stanwix, declaring the same to be perpetual. And if the Mohawks shall, within six months, declare their assent to the same, they shall be considered as included.

Mohawks allowed six months to assent.

Done at Fort Harmar, on the Muskingum, the day and year first above written.

In witness whereof, the parties have hereunto, interchangeably, set their hands and seals.

Ar. St. Clair, [L.S.]
Cageaga, or Dogs Round the Fire [L.S.]
Sawedowa, or The Blast, [L.S.]
Kiondushowa, or Swimming Fish, [L.S.]
Oncahye, or Dancing Feather, [L.S.]
Sohaeas, or Falling Mountain, [L.S.]
Otachsaka, or Broken Tomahawk, his x mark, [L.S.]
Owenewa, or Thrown in the Water, his x mark, [L.S.]
Gyantwaia, or Cornplanter, his x mark, [L.S.]
Gyasota, or Big Cross, his x mark [L.S.]
Kannassee, or New Arrow, [L.S.]
Achiout, or Half Town, [L.S.]
Anachout,or The Wasp,his xmark, [L.S.]
Tekahias, or Long Tree, his x mark, [L.S.]
Onecnsetee, or Loaded Man, his x mark, [L.S.]
Kiahtulaho, or Snake, [L.S.]
Aqueia, or Bandy Legs, [L.S.]
Kiandogewa, or Big Tree, his x mark, [L.S.]
Chishekoa, or Wood Bug, his x mark, [L.S.]
Sessewa, or Big Bale of a Kettle, [L.S.]
Sciahowa, or Council Keeper, [L.S.]
Tewanias, or Broken Twig, [L.S.]
Sonachshowa, or Full Moon, [L.S.]
Cachunwasse, or Twenty Canoes, [L.S.]
Hickonquash, or Tearing Asunder, [L.S.]

In presence of --

Jos. Harmar, lieutenant-colonel commanding First U.S. Regiment and brigadier-general by brevet,
Richard Butler,
Jno. Gibson,
Will. M'Curdy, captain,
Ed. Denny, ensign First U.S. Regiment,
A. Hartshorn, ensign,
Robt. Thompson, ensign, First U.S. Regiment,
Fran. Leile, ensign,
Joseph Nicholas.

SEPARATE ARTICLE.

Robberies and murders to be punished according to the law. etc.

Should a robbery or murder be committed by an Indian or Indians of the Six Nations, upon the citizens or subjects of the United States, or by the citizens or subjects of the United States, or any of them, upon any of the Indians of the said nations, the parties accused of the same shall be tried, and if found guilty, be punished according to the laws of the state, or of the territory of the United States, as the case may be, where the same was committed.

Stolen horses to be restored.

And should any horses be stolen, either by the Indians of the said nations, from the citizens or subjects of the United States, or any of them, or by any of the said citizens or subjects from any of the said Indians, they may be reclaimed into whose possession soever they may have come; and, upon due proof, shall be restored, any sale in open market notwithstanding; and the persons convicted shall be punished with the utmost severity the laws will admit.

Offenders to be delivered up.

And the said nations engage to deliver the persons that may be accused, of their nations, of either of the beforementioned crimes, at the nearest post of the United States, if the crime was committed within the territory of the United States; or to the civil authority of the state, if it shall have happened within any of the United States.

Ar. St. Clair.

TREATY WITH THE SIX NATIONS, 1794.

Nov. 11, 1794.

7 Stat., 44.
Proclamation, Jan. 21, 1795.

A Treaty between the United States of America, and the Tribes of Indians called the Six Nations.

The President of the United States having determined to hold a conference with the Six Nations of Indians, for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them; and Timothy Pickering being appointed sole agent for that purpose; and the agent having met and conferred with the Sachems, Chiefs and Warriors of the Six Nations, in a general council: Now, in order to accomplish the good design of this conference, the parties have agreed on the following articles; which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the Six Nations.

ARTICLE I.

Peace and friendship perpetual.

Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations.

ARTICLE II.

Certain lands secured to Indians.

The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New-York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends

residing thereon and united with them, in the free use and enjoyment thereof; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

ARTICLE III.

Boundary of lands belonging to the Seneca nation.

The land of the Seneka nation is bounded as follows: Beginning on Lake Ontario, at the north-west corner of the land they sold to Oliver Phelps, the line runs westerly along the lake, as far as O-yong-wong yeh Creek, at Johnson's Landing-place, about four miles eastward from the fort of Niagara; then southerly up that creek to its main fork, then straight to the main fork of Stedman's creek, which empties into the river Niagara, above fort Schlosser, and then onward, from that fork, continuing the same straight course, to that river; (this line, from the mouth of O-yong-wong-yeh Creek to the river Niagara, above fort Schlosser, being the eastern boundary of a strip of land, extending from the same line to Niagara river, which the Seneka nation ceded to the King of Great-Britain, at a treaty held about thirty years ago, with Sir William Johnson:) then the line runs along the river Niagara to Lake Erie; then along Lake Erie to the north-east corner of a tri angular piece of land which the United States conveyed to the state of Pennsylvania, as by the President's patent, dated the third day of March, 1792; then due south to the northern boundary of that state; then due east to the south-west corner of the land sold by the Seneka nation

to Oliver Phelps; and then north and northerly, along Phelps's line, to the place of beginning on Lake Ontario. Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

ARTICLE IV.

Six nations never to claim other lands in the United States.

The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States: nor ever disturb the people of the United States in the free use and enjoyment thereof.

ARTICLE V.

Right to make and use a road granted.

The Seneka nation, all others of the Six Nations concurring, cede to the United States the right of making a wagon road from Fort Schlo ser to Lake Erie, as far

south as Buffaloe Creek; and the people of the United States shall have the free and undisturbed use of this road, for the purposes of travelling and transportation. And the Six Nations, and each of them, will forever allow to the people of the United States, a free passage through their lands, and the free use of the harbors and rivers adjoining and within their respective tracts of land, for the passing and securing of vessels and boats, and liberty to land their cargoes where necessary for their safety.

ARTICLE VI.

In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations; and because the United States desire, with humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established, strong and perpetual; the United States now deliver to the Six Nations, and the Indians of the other nations resid ing among and united with them, a quantity of goods of the value of ten thousand dollars. And for the same considerations, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of three thousand dollars to the one thousand five hundred dollars, heretofore allowed them by an article ratified by the President, on the twenty third day of April, 1792;[a]

Present and annuity.

[a] It appears that this treaty was never ratified by the Senate. See American State Papers, Indian Affairs, vol. 1, p. 232. Also, post 1027.

making in the whole, four thousand five hundred dollars; which shall be expended yearly forever, in purchasing clothing, domestic animals, implements of husbandry, and other utensils suited to their circumstances, and in compensating useful artificers, who shall reside with or near them, and be employed for their benefit. The immediate application of the whole annual allowance now stipulated, to be made by the superintendent appointed by the President for the affairs of the Six Nations, and their Indian friends aforesaid.

ARTICLE VII.

Retaliation restrained.

Lest the firm peace and friendship now established should be inter rupted by the misconduct of individuals, the United States and Six Nations agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place; but, instead thereof, complaint shall be made by the party injured, to the other: By the Six Nations or any of them, to the President of the United States, or the Superintendent by him appointed: and by the Superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the nation to which the offender belongs; and such pru dent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the legislature (or great council) of the United States shall make other equitable provision for the purpose.

NOTE. It is clearly understood by the parties to this treaty, that the annuity

stipulated in the sixth article, is to be applied to the benefit of such of the Six Nations and of their Indian friends united with them as aforesaid, as do or shall reside within the boundaries of the United States: For the United States do not interfere with nations, tribes or families, of Indians elsewhere resident.

In witness whereof, the said Timothy Pickering, and the sachems and war chiefs of the said Six Nations, have hereto set their hands and seals.

Done at Konondaigua, in the State of New York, the eleventh day of November, in the year one thousand seven hundred and ninety-four.

Timothy Pickering,	[L.S.]
Onoyeahnee, his x mark,	[L.S.]
Konneatorteeooh, his x mark, or Handsome Lake,	[L.S.]
Tokenhyouhau, his x mark, alias Captain Key,	[L.S.]
Oneshauee, his x mark,	[L.S.]
Hendrick Aupaumut,	[L.S.]
David Neesoonhuk, his x mark,	[L.S.]
Kanatsoyh, alias Nicholas Kusik,	[L.S.]
Sohhonteoquent, his x mark,	[L.S.]
Ooduhtsait, his x mark,	[L.S.]
Konoohqung, his x mark,	[L.S.]
Tossonggaulolus, his x mark,	[L.S.]
John Skenendoa, his x mark,	[L.S.]
Oneatorleeooh, his x mark,	[L.S.]
Kussauwatau, his x mark,	[L.S.]
Eyootenyootauook, his x mark,	[L.S.]
Kohnyeaugong, his x mark, alias Jake Stroud,	[L.S.]
Shaguiesa, his x mark,	[L.S.]
Teeroos, his x mark, alias Captain Prantup,	[L.S.]
Sooshaoowau, his x mark,	[L.S.]
Henry Young Brant, his x mark,	[L.S.]
Sonhyoowauna, his x mark, or Big Sky,	[L.S.]
Onaahhah, his x mark,	[L.S.]
Hotoshahenh, his x mark,	[L.S.]
Kaukondanaiva, his x mark,	[L.S.]
Nondiyauka, his x mark,	[L.S.]
Kossishtowau, his x mark,	[L.S.]
Oojaugenta, his x mark, or Fish Carrier,	[L.S.]
Toheonggo, his x mark,	[L.S.]
Ootaguasso, his x mark,	[L.S.]
Joonondauwaonch, his x mark,	[L.S.]
Kiyauhaonh, his x mark,	[L.S.]

Ootaujeaugenh, his x mark, or Broken Axe, [L.S.]
Tauhoondos, his x mark, or Open the Way, [L.S.]
Twaukewasha, his x mark, [L.S.]
Sequidongquee, his x mark, alias Little Beard, [L.S.]
Kodjeote, his x mark, or Half Town, [L.S.]
Kenjauaugus, his x mark, or Stinking Fish, [L.S.]
Soonohquaukau, his x mark, [L.S.]
Twenniyana, his x mark, [L.S.]
Jishkaaga, his x mark, or Green Grasshopper, alias Little Billy, [L.S.]
Tuggehshotta, his x mark, [L.S.]
Tehongyagauna, his x mark, [L.S.]
Tehongyoowush, his x mark, [L.S.]
Konneyoowesot, his x mark, [L.S.]
Tioohquottakauna, his x mark, or Woods on Fire, [L.S.]
Taoundaudeesh, his x mark, [L.S.]
Honayawus, his x mark, alias Farmer's Brother, [L.S.]
Soggooyawauthau, his x mark, alias Red Jacket, [L.S.]
Konyootiayoo, his x mark [L.S.]
Sauhtakaongyees, his x mark, or Two Skies of a length, [L.S.]
Ounnashattakau, his x mark, [L.S.]
Kaungyanehquee, his x mark, [L.S.]
Sooayoowau, his x mark, [L.S.]
Kaujeagaonh, his x mark, or Heap of Dogs, [L.S.]
Soonoohshoowau, his x mark, [L.S.]
Thaoowaunies, his x mark, [L.S.]
Soonongjoowau, his x mark, [L.S.]
Kiantwhauka, his x mark, alias Cornplanter, [L.S.]
Kaunehshonggoo, his x mark, [L.S.]

Witnesses:

Israel Chapin.
William Shepard, jr.
James Smedley.
John Wickham.
Augustus Porter.
James K. Garnsey.
William Ewing.

Israel Chapin, jr.
Horatio Jones.
Joseph Smith.
Jasper Parish,
Interpreters.
Henry Abeele.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

ANDREW L. COOK, Individually and doing business as ANDY COOK'S TRUCK STOP and JEANETTE COOK, Individually and doing business as ANDY COOK'S TRUCK STOP,

Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Defendant.

AFFIDAVIT

No. 93-496 T
(Judge Hodges)

STATE OF NEW YORK)
COUNTY OF) SS.:

WILLIAM A. STARNA, being duly sworn, deposes and says:

1.1 am an anthropologist and professor of anthropology at the State University of New York College at Oneonta. For many years, my concentration has been in the field of Indian studies, particularly as it relates to the history of the Indian nations in the State of New York. I have also conducted detailed studies of the various treaties between the New York State Indians and the United States and New York State. Annexed hereto as Exhibit "A" is my curriculum vitae which identifies my numerous publications on these and related topics. Over the past several years, I have focused extensively on the Six Nations or Iroquois Confederacy, of which the Onondaga Nation is a part, with particular emphasis on the historical and anthropological context within which various treaties were signed between the Six Nations and the United States. I have carefully examined numerous original documents referencing the negotiation of and circumstances surrounding these treaties, many of which have not been reported in the literature.

2. I have been retained by plaintiffs to determine, through historical and anthropological research, study and investigation, whether any treaties between the Onondaga Nation, of which the Cooks are members, and the United States exempt the Cooks from federal motor fuel excise tax on their sale of diesel fuel on the Onondaga Nation. My efforts have been focused on determining how the Onondaga understood the treaties entered into between them and the United States and the circumstances surrounding these treaties.

3. After much research and inquiry, I have reached the conclusion, to a reasonable degree of anthropological and historical certainty, that the Canandaigua Treaty exempts the Cooks from federal excise taxation for the sale of any motor fuel which took place on sovereign Onondaga land. I hereby incorporate into this affidavit my report, which is annexed hereto as Exhibit "B", which summarizes my rationale and findings with respect to these issues.

4. In summary, the Canandaigua Treaty guarantees that the Onondagas will have free use and enjoyment of their land. At no time in history has the United States ever had a title to the land upon which the Cooks sold motor fuel.

5. As set forth in my report, the Canandaigua Treaty was between two sovereign nations, and there is absolutely no indication historically that the treaty suggested otherwise. On the contrary, Indian Commissioner Timothy Pickering went out of his way to express to his superiors that the Six Nations were to be treated with the same dignity, respect and power as any sovereign nation.

6. The language "free use and enjoyment," as used in the Canandaigua Treaty to describe the rights of the Six Nations was also used to define the rights of the United States to lands owned by the Six Nations which were being released to the United States. These facts compel the conclusion that the United States acquired the same absolute title and control over these lands as the Six Nations had over the lands it retained under the treaty. Any other interpretation of this language would suggest that the Six Nations could impose taxes

upon lands which are now states within the United States. Also, as described in my report, the terms used in this treaty were unique and stronger than those contained in other Indian treaties during that period. (Exhibit "B" at 39-40)

7. It is also apparent from the historical data I have examined that the Canandaigua Treaty specifically excluded interference with any activities taking place on the "land," which at that time was synonymous with "nation" or "country." Pickering's intention was to see that the Six Nations were able to engage in activities without interference or interruption, whether it be farming or commerce. In my opinion, the use of Onondaga land by the Cooks to sell diesel fuel falls within the category of use and enjoyment of the land acquired under the Canandaigua Treaty.

8. I am advised that the government in its motion for summary judgment is relying upon the case of Lazore v. United States, ___ F2d ___ (Dec. 6, 1993, No. 92-766, 3d Cir.) decided in the Third Circuit. In particular, the government requests that this Court conclude, based upon the factual findings in the Lazore case, that the Canandaigua Treaty does not provide an exemption for federal excise tax. I have examined the Lazore case as well as the expert report submitted in that case by Robert Venables. Mr. Venables omitted the voluminous data of Pickering's involvement in the treaty process. Mr. Venables also made no historical comparisons to other treaties during the same time period, failed to draw the court's attention to the reciprocal language contained in the Canandaigua Treaty, and provided no references to any written sources.

9. Accordingly, the factual basis relied upon by the Cooks to support their position that the Canandaigua Treaty exempts them from federal excise taxation is different and more comprehensive in nature, scope and historical detail than what was provided in the Lazore case. It is my opinion that had relevant and documented historical data been provided in the Lazore case, the Court would have found that the Canandaigua Treaty provided sufficiently broad language to preclude the

imposition of federal excise tax for any activities conducted on sovereign Indian land.

10. I am advised that the Lazore case addressed exemption from income tax, which is a tax on the earnings of individuals. In contrast, excise tax, as I understand it, is a tax relating to the sale of goods from a particular location, which in this case is the sovereign Onondaga Nation. The express Canandaigua Treaty language, in my opinion, precludes any such tax on activities being conducted on Onondaga land, including the Cooks' sale of diesel fuel. In my opinion, this distinction makes the holding in the Lazore case anecdotal, at best, and does not serve as any basis for rendering a decision adverse to the Cooks' exemption rights.

/s/ William A. Starna
William A. Starna

Sworn to before me this
1st day of April, 1994.

/s/ Janet L. Tobey
Notary Public

CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing affidavit of William A. Starna has been made on counsel for the defendant, by forwarding a copy on this 25th day of April, 1994, in a United Parcel Service Next Day Air envelope properly addressed to her as follows:

Elizabeth K. Wickstrom, Esq.
Dept. of Justice
Tax Div./Claims Court Sect
555 4th St. NW ction
Washington, DC 20001

/s/ Arthur J. Siegel
Arthur J. Siegel, Esq.
Bond, Schoeneck & King, LLP
111 Washington Avenue
Albany, New York 12210-2280
Telephone: (518) 462-7421

April 25, 1994

A REPORT ON THE 1784 TO 1794 TREATY PERIOD AND THE SIX NATIONS IROQUOIS

by
William A. Starna, Ph.D

December 8, 1993

This is a preliminary draft report on the 1784 to 1794 treaty period in which the Iroquois were participants. What follows is written for discussion and heuristic purposes only, and is subject to change pending further research and investigation.

The 1783 Treaty of Paris, formally ending the Revolutionary War, was silent regarding Loyalist Indians. There were no provisions made to end the hostilities with those tribes that had fought in support of the British or for the disposition of their lands. The United States alleged, however, that by the treaty the Crown had ceded all of its territories south of the Great Lakes and the St. Lawrence, and east of the Mississippi, whether or not they were occupied by Indian people (Graymont 1972:259; Wallace 1972:151).

In October 1783, the Committee on Indian Affairs, commissioned by the Continental Congress, issued its report on the proposed settlement of these western territories and the Indians who resided there. A principal recommendation of the committee was to establish a property line between the United States and the Indians, a means by which further conflict could be averted. To carry out the wishes of the national government, commissioners were appointed and charged with ending the war with the hostile tribes. They were also to secure a land cession from these tribes, a form of retribution for having participated in the war (Campisi 1988:50-51).

On October 22, 1784, the United States concluded the "Treaty with the Six Nations" (7 Stat. 15; see Kappler 1904:5-6), the Fort Stanwix treaty. Four of the parties to the treaty, the Senecas, Cayugas, Onondagas, and Mohawks, were dealt with harshly and as defeated people, having "waged war without provocation" against the United States during the Revolution (Campisi 1988:54-55). By Article III of this treaty, the four hostile Iroquois nations, principally the Senecas, were compelled to surrender all of their lands west of a line of cession running generally south from a point some four miles east of the mouth of the Niagara River to the northern boundary of Pennsylvania, west along that boundary to the northwest corner of that state, and south along Pennsylvania's western boundary to the Ohio River (7 Stat. 15). This cession by the four hostile tribes included their claims to land in the Ohio Valley. They were, however, "secured in the peaceful possession" of their lands remaining east and north of the line of cession (ibid.).

The Tuscaroras and Oneidas were treated differently, as they had joined with the Americans in their struggle against the Crown (Campisi 1988:55). No cession of land was demanded from these tribes. In fact, Article II of the Fort Stanwix treaty secured them "in the possession of the lands on which they are settled" (7 Stat. 15).

Once the treaty was signed, commissioners from Pennsylvania dealt separately with the Senecas to acquire the lands constituting the Erie Triangle and its valuable harbor at Presqu' Isle (Graymont 1972:282 283; Wallace 1972:152, 174).

Following on the heels of the Fort Stanwix treaty was the 1785 treaty at Fort McIntosh in the Ohio Valley of Pennsylvania (7 Stat. 16; see Kappler 1904:6-8). As they had at Fort Stanwix, the federal commissioners offered the harshest of terms to the Indians, intent upon disabling the Indian confederacy in the Ohio Valley. At the treaty's conclusion, the western Indians had surrendered the vast majority of their lands in the Northwest, excepting a reservation between the Cuyahoga and Maumee Rivers, bounded on the north by Lake Erie, and on the south by a line drawn east and west through central Ohio.

The Fort Stanwix and Fort McIntosh treaties were a source of considerable agitation and discontentment among the Indians (Jones 1982:152). Those Iroquois who had participated in the Fort Stanwix treaty, and signed away most of the Seneca lands, received a hostile reception upon their return to their villages (Graymont 1972:283-284). Additionally, by dealing with the Iroquois tribes individually, rather than as a political alliance, and then meeting separately with the tribes in the Ohio Valley, the United States had disregarded Indian assertions of a confederacy (Wallace 1972:151-152). And the Senecas were infuriated over the Erie Triangle cession to Pennsylvania. In 1786, the Iroquois sitting in council at Buffalo Creek repudiated the Fort Stanwix treaty signalling their intention not to abide by its demands (ibid.:152; Graymont 1972:284).

Much to the consternation of the United States, the tribes in the Ohio Valley followed the Iroquois lead and rejected the provisions of the Fort McIntosh treaty. The tribes argued, much like the Iroquois had, that Indian signatories to the treaty were unauthorized and had no right to cede any lands whatsoever. However, unlike the more vulnerable Iroquois, whose reduced land holdings and villages were situated along the western boundary of expansionist New York State, the Ohio Valley Indians were prepared to fight to retain their homelands (Wallace 1972:154). Yet the threat of the four hostile Iroquois tribes joining their brethren in the west forced the United States to rethink its policy regarding the taking of Indian lands.

One outcome of Indian complaints about land and threats of war was the Fort Harmar treaty in January 1789 (7 Stat. 33). In a report to the President of the United States in May, 1789, Secretary of War Knox laid out the shift in federal policy towards Indians that had led to Fort Harmar. He remarked that "the Indians are especially tenacious of their lands, and generally do not relinquish their right, excepting on the principle of a specific consideration, expressly given for the purchase of the same" (American State Papers-Indian Affairs 1832:1, 8). He also noted that the previous practice of the English colonies and government had been to purchase Indian claims, and that to do otherwise, for example, take lands by a theory of conquest, was not only difficult, but expensive.

The treaties of Fort Stanwix and Fort McIntosh "do not state the limits therein defined are by virtue of a purchase," the Secretary wrote, and moreover, "have been opposed, and complained of [by the Indians]" (ibid.). Thus, Knox explained, the Treaty of Fort Harmar was held "for the purpose of knowing the causes of uneasiness among the said tribes, and hearing their complaints, of regulating trade, and amicably settling all affairs concerning lands and boundaries, between them and the United States" (ibid.:7-8). Instructions to the governor of the Northwest Territory offer further insight into the treaty's objectives: "Although the purchase of the Indian right of soil is not a primary object of holding this

treaty, yet you will not neglect any opportunity that may offer, of extinguishing the Indian rights to the westward, as far as the river Mississippi" (ibid.:9).

The Treaty of Fort Harmar, however, was as unsatisfactory to the Indians as had been previous agreements, notwithstanding the alleged changes in federal policy. As they had at Fort Stanwix and Fort McIntosh, the federal representatives dictated the treaty's terms to the Indians. There were no mutual negotiations. The boundaries of the territory ceded by the Indians were identical to those of the treaties of 1784 and 1785. Indian claims to the Ohio Valley were dismissed, while the complaints of the Senecas about their loss of land went unresolved. The Indians were left with little choice but to concede to United States demands. Any pretense by the Indians of the existence of a confederacy, western or eastern, evaporated (Downes 1940:306-308).

The Treaty of Fort Harmar did not bring the peace to the frontier or the easy access to, or control of, Indian lands, that the United States had hoped for. Raids, counter-raids, and killings by Indians determined to resist federal policy, and by recalcitrant, intractable whites bent on subduing the savages on the Ohio, continued (ibid.:311 312). All out war on the frontier appeared inevitable, while further east, concerns over what course the Iroquois would take mounted.

The national policy toward Indian people in the west was outlined by Secretary of War Knox to the President in June, 1789:

> In examining the question how the disturbances on the frontiers are to be quieted, two modes present themselves, by which the object might perhaps be effected; the first of which is by raising an army, and extirpating the refractory tribes entirely, or 2ndly by forming treaties of peace with them, in which their rights and limits should be explicitly defined, and the treaties observed on the part of the United States with the most rigid justice, by

> punishing the whites, who should violate the same (American State Papers-Indian Affairs 1932:1, 13).

The first "mode," extirpation, flew in the face of Knox's vision of the ideological principles that underlay the republic. An inquiry might arise, Knox cautioned, whether the United States had a "clear right" to take such action consistent with "the principles of justice and the laws of nature." Still, he continued, "[i]t is presumable, that a nation solicitous of establishing its character on the broad basis of justice, would not only hesitate at, but reject every proposition to benefit itself, by the injury of any neighboring community, however contemptible and weak it might be, either with respect to its manners or power" (ibid. :13).

In his report, Knox discussed at some length the Indians' "right of the soil" [aboriginal title]. He concluded that the "principle of the Indian right to the lands they possess" is "conceded," and that "the dignity and interest of the nation will be advanced by making it the basis of the future administration of justice towards the Indian tribes," that is, administration through treaties (ibid.:13). This fundamental principle would dominate federal Indian policy throughout the treaty-making period.

Knox believed that the Fort Harmar treaty had followed the principles that he had described to the president and that peace would necessarily follow (ibid:13). However, events on the Ohio obliged the secretary to respond otherwise.

The more westerly Indians in the Ohio country, principally the Miamis, were not persuaded by Knox's conviction about the Fort Harmar treaty. To them, the agreement was of no consequence as they had not been present at its signing. Moreover, it had been negotiated by only "a fragment of the confederacy" and no important chiefs (Downes 1940:311; Wallace 1972:158). Encouraged by British traders and motivated by attacks on their villages by revenge-seeking Kentuckian freebooters, the Miamis and their allies needed no further prompting to continue hostilities.

In September, 1790, Knox approved plans to begin a military operation on the Wabash whose objective was to subdue the hostile Indian tribes (American State Papers-Indian Affairs 1832:1, 100). As federal troops and the militia under General Harmar prepared to deliver what Knox characterized as "a sudden stroke" against these Indians, efforts were initiated to ensure the continued neutrality of the Iroquois, especially the Senecas (ibid.:100; Phillips 1966:166). The task of meeting with the Iroquois and convincing them to remain peaceful and disengaged from events along the Ohio was left to the newly-appointed Indian commissioner, Timothy Pickering.

Pickering arranged to meet with the Senecas at Tioga Point, 80 miles north of his home at Wilkes-Barre, in late October, 1790. The main body of Senecas, however, did not arrive until November 14. Council protocol was followed, with a few lapses by the inexperienced Pickering, that included a renewal of the chain of friendship and a distribution of gifts to the Indians (Phillips 1966:169-170). The conference was a success.

> Pickering had no great difficulty at the Conference, for there were no lands to be bargained for, no boundaries to be disputed, and no alliances to be formed. The Indians had a specific grievance to be redressed, and the United States government was prepared to redress it. The Indians sought tokens of friendship and Pickering had them to give. The United States sought to keep the Indians at peace, and the Senecas were in a surprisingly cooperative mood (ibid.:170).

Following the Tioga conference, Pickering returned to Philadelphia with a delegation of Seneca chiefs led by Cornplanter. Once there, "measures were taken to impress them [the Senecas] with the moderation of the United States, as it respected the war with the Western Indians; that the coercive measures against them [the Western Indians] had been the consequence of their refusal to listen to the invitations of peace, and a

continuance of their depredations on the frontiers" (American State Papers-Indian Affairs 1832:1, 139).

Having had explained to them why a military campaign against the western Indians was necessary, the Senecas were then warned "to restrain their young men from taking part with the hostile Indians." Cornplanter assured government officials that he and those Senecas under his influence would "not only be friends to the United States, but that they would endeavor to prevent the further hostilities of the Western Indians." The Seneca delegation, however, failed to convince the Miamis to refrain from further hostilities (ibid.:139).

With the now very real threat of war in the west, the United States pressed even harder to secure Iroquois neutrality In April, 1791, measures were taken "to draw the Six Nations to a conference, at a distance from the theatre of war, in order not only to prevent their joining therein, but, also, if necessary, to obtain some of their young men to join our army, in case of hostilities being inevitable" (ibid.:139).

The national government had every reason to be uneasy about the inclinations of Six Nations. The frequent border incidents, which had resulted in the deaths of Iroquois people, and the inability of the United States to prevent them, were obviously serious issues. On the other hand, the ever-increasing pressures by whites for land on the frontier, and the continued bitterness of the Senecas and others of the Six Nations over the Fort Stanwix treaty, begged immediate attention.

Knox wrote instructions to Pickering to meet again with the Iroquois and "to impress on the minds of the Indians that their interest and happiness depend upon the protection and friendship of the United States, and to conciliate their affections, for which purpose you will use you highest exertion" (ibid.:165).

Pickering, in turn, sent a message to the "Brothers, Sachems, Chiefs and Warriors of the Six Nations," inviting them to a council to be held at Painted Post the following June. "[A]t Tioga," Pickering reminded the Indians, "I assured you

that in all my conduct you should find me open and sincere." It was therefore his desire "again to brighten the chain, and to remove all causes of jealousies and discontents" (Pickering Papers 60:56). He ordered that his invitation be carried first to the Senecas and then to the other Iroquois tribes (ibid.:58-60).

The place of the meeting was changed from Painted Post to Newtown Point, "by reason of the Waters being so low and that Your [Pickering's] provision and goods was of such great weight that you could not get...up to the place appointed, without great expence, and trouble" (ibid.:67). Even so, it was the last of June before the Indians were fully assembled. The conference did not formally open until July 2.

Pickering had been made aware of the fact, much before the beginning of the conference, that the Iroquois were generally suspicious of American actions and motives, especially as they concerned the Indians in the Ohio country. But at the same time, he had also discovered how the Iroquois intended to respond. In a reply to Pickering's invitation to attend the conference, several of the chiefs at Buffalo Creek offered the following:

> At present we are not a little uneasy in our minds as our heads are intoxicated with the different messages crowding in upon us at the same time, but we wish to convince you that our intentions are good, and our hearts are inclined to peace.
>
> You warn us against listening to mischeavous people who may mix amongst us, and spread false and mischeavous reports. Lest evil reports may also be spread amongst you to our prejudice, we take this opportunity (by Parrish who you have sent to us) to acquaint you of the reasons which influenced us in Council with Colonel Proctor, who was very pressing for us to accompany him through the different Indian nations now at war with the Thirteen States. To which we objected for the following reasons Viz: We are desirous of living upon a friendly footing with the thirteen States; and of being

> instrumental in bringing about a peace between you and our Brothers the Western Nations, and for that purpose had, previous to Colonel Proctors arrival, dispatched Captain Brant with some Chiefs of each Nation, about Twenty five in all, to open their eyes and endeavour to bring them to an accommodation with the people of the thirteen States, and stop the effusion of innocent blood. Notwithstanding these conciliatory steps had been previously taken, we agreed to accompany him with fourteen of our Chiefs and young men, and second the operations of Captain Brant, by giving every assistance in our power to Colonel Proctor. Whilst we were preparing ourselves for this journey, which made our minds uneasy and determined us to first attend your Invitation where we expect to have those matters explained to our mutual satisfaction, and hope to have the chain of friendship then brightened (ibid.:63-63A).

Thus, Pickering learned that although the Iroquois wished to remain peaceful and on good terms with the United States, they would not take up arms against the western Indians. It remained, however, for Pickering to secure the strongest guarantees he could for Iroquois neutrality.

In his opening speech at Newtown, Pickering announced that the purpose of the meeting was to brighten the chain of friendship, "to remove all causes of jealousies and discontents," and to address the issue of the war with the western Indians. "I can think but of two grounds of the jealousy which you may entertain of your brothers of the United States," he continued. "One lest, they should attempt to take your lands from you; and the other, lest, in order to get your lands, and in revenge for injuries, they should attempt to destroy you or drive you away" (ibid.:78).

Pickering spoke first to the issue of land and the apprehensions about land the Iroquois had expressed. As he had at Tioga, he acquainted the Indians with the provisions of the

Indian Nonintercourse Act of 1790, which, he said, "is intended for the mutual advantage of the United States and the Indian tribes" (ibid.:78A). This was followed by his reading from a speech that President Washington had made to Cornplanter and his followers in Philadelphia the previous winter. "When *he* [the president] speaks," Pickering declared to the assembled Indians, "all who know believe him. All the people of the United States believe his words: for they have always found them true....Let *his words* therefore sink deep into your hearts, let them never be forgotten" (ibid.:79).

Washington fully understood what most distressed the Iroquois. "'Your great object seems to be the security of your remaining lands," he had said to the Senecas, and he proceeded to lay out the guarantees of the Indian Non intercourse Act (ibid.:79). Finishing his reading of Washington's message, Pickering exhorted the Indians:

> Brothers, you have now heard the law of the United States, and the words of our Great Chief concerning your lands: That law and those words are the highest possible security for your enjoying them undisturbed. All further assurances must therefore be superfluous and vain. Here, then, I will quit this subject: not in the least doubting, but that, concerning your *lands, your minds must now be nerfectlv at ease* (ibid.:79).

At Newtown, Pickering also offered the Six Nations assurances that their land was under the protection of the United States and that it had no intention of destroying or driving away the Indians (ibid.: 86A-87).

> And now, Brothers, from the whole that I have told you, I draw this conclusion- that I have given you abundant proof that the United States are your true and best friends; that instead of adopting a narrow, selfish, inhuman policy (or of conduct) which would aim at your destruction, they are noble-minded, generous, and benevolent; and viewing you & themselves as having one father and mother, who

> is the Great Spirit, they speak to you as brothers; and offer to assist you in becoming numerous, knowing and happy like themselves; and hence that all jealousy and discontent must now be done away, and your minds be perfectly at ease (ibid.: 87b).

The Seneca chief Red Jacket, however, made it plain to Pickering that the Iroquois would remain vigilant, notwithstanding the good words that had been spoken at Newtown. "You have heard us speak in council," Red Jacket said. "We wish Congress to be very careful how they speak; and to speak to us of nothing but peace; and we desire they would do the same among their own people" (ibid.:93).

The Newtown council was judged a success insofar as the United States was concerned. Among other things, it provided Pickering the opportunity to explain to the Six Nations the national government's policy in the west, to assure the Iroquois of America's friendship and its guarantee to protect Indian lands, and to learn the extent of Indian land grievances.

Although Pickering was rebuffed when he attempted to enlist Iroquois warriors against the Indians on the Ohio, he was apparently successful in preventing their joining the western tribes. And he did persuade the Six Nations to send emissaries there to petition for peace (ibid.:101 102, 103, 104A; Phillips 1966:176-177).

The Six Nations were also receptive to Pickering's proposition that a shift to an economy based on farming would be of considerable benefit, and would insure the survival of the Six Nations (Pickering Papers 60:82[A]-84). His suggestion, however, was subject to a broad qualification and a caution from Red Jacket regarding the degree to which the Six Nations were prepared to enact change or relinquish their independence.

> When you delivered us your [Pickering's] speech, you told us of all the advantages which the white people reaped from their labour....When you laid the whole speech before us: we took it into

> consideration: We saw it was good: and were willing to accept of it. But we were not willing to throw away all our old rules: but were willing that both should live. Tis the opinion of all the Six Nations here, that we cannot take all the ways of the white people at once, but by degrees. And in the same manner we must lay aside our old rules - by degrees....Now we have agreed to accept the new rules you proposed, that they may live along side our old rules. We have accepted your advice and your rules, which we think are good, and put them by the side of ours: for we would have our rules live with yours (ibid.:92A).

Pickering's proposal to introduce "the art of husbandry, in its improved state" to the Six Nations, which he was "enjoined to repeat" by his instructions, had important corollaries (American State Papers-Indian Affairs 1832:1, 170; Pickering Papers 60:82ff.). Husbandry would lead necessarily, Pickering argued, "to a *separate occupancy* [sic] and *enjoyment of land* [sic]," and "could not take place without *exclusive property* [emphasis added], that the improver might enjoy the fruit of his labor" (American State Papers-Indian Affairs 1832:1, 170).

Of additional interest in Pickering's analysis of the status of Indian land and the introduction of husbandry, is his consideration of federal rights of preemption

> Should that assistance [for introducing the art of husbandry] prove successful, (for at this stage of the business I cannot entertain a *suspicion* that such assistance will not be furnished) it will tend to defeat the pre-emption right *altogether*, unless those improvements, by showing the Indians how small a portion of their lands, under proper cultivation, will suffice for their ample support, should induce them to part with the residue in exchange for a full supply of domestic animals, implements of husbandry, and other necessaries adapted to their improving

> condition; and this, as I some time ago intimated to Mr. Morris appeared to me to afford the only chance of extinguishing the Indian title to any of the lands he had bought of Massachusetts (ibid.:170).

Thus, by 1791, the United States fully recognized and conceded that the Indian tribes, including the Six Nations, held the underlying "right to the soil." It had also asserted, by the Indian Nonintercourse Act, that the right of preemption to Indian lands was in the United States or was subject to its dominion. Furthermore, federal policies that may have been assimilationist in principle, such as the proposal to instruct the Six Nations in the "art of husbandry," acknowledged a plain fact. The "art of husbandry" demanded that the Indian tribes possess absolute and unconditional rights regarding the use of their lands: that is, the "separate occupancy" and "enjoyment of land" that was the "exclusive property" of the Indian tribes.

In October, 1791, the American military operation against the western Indians took a decidedly indecorous turn. General St. Clair's troops were routed, suffering 630 dead, in a bungled campaign against the Miamis (Downes 1940:318; Phillips 1966:178). The hostile tribes reveled in their victory. Those tribes that had declared neutrality found their resolve weakened as their younger warriors urged the joining of what appeared to be an easily won war against the Americans (Downes 1940:320-321).

The following March saw representatives of the Six Nations in Philadelphia, on Pickering's invitation, to complete the arrangements for introducing farming to the Indians (Phillips 1966:177). With St. Clair's defeat, however, Secretary of War Knox saw a different objective for the meeting -to persuade the Iroquois to join the United States against the western tribes. In his mind, discussions on the "art of husbandry" were to take a decidedly back seat to these efforts.

Pickering was furious when he learned of Knox's proposal. He wrote a strongly worded letter to President Washington:

> The manner in which I have been imployed to effect the present visit of the chiefs of the Five Nations renders me peculiarly interested that the negociations with them should conform with the direct object of the invitation. This object is indelibly impressed on my mind: it having been the main arguement offered by me to convince them of the real friendship of the United States....
>
> Last Thursday, when the Indians gave me their Formal answers to my invitation, they stated many causes of their delay. Among other things they told me that [Joseph] Brant [the Mohawk chief] had been the means of detaining them. Brant (said they) who knows as much as white people know, told us, that the real design of the invitation was not on the paper but *behind* it. That is, the appointed *object* of the invitation was merely *ostensible*: while the real *object* was *kept out of sight*....
>
> Indians have been so often deceived by white people that *White Man* is, among many of them, but another name for *Liar*. Really, Sir I am unwilling to be subjected to this infamy. I confess I am not indifferent to a good name even among Indians. Besides, they viewed, and expressly considered me, as "*your Representative*" (Pickering Papers 62:11-12).

Knox reacted immediately to Pickering's complaint, asking him to continue his participation and leadership role in the conference. Thus, Pickering's character and integrity remained intact and unassailable, a mark of the man throughout his distinguished career as a diplomat on Indian affairs (Phillips 1966).

The situation in the Ohio Valley did not change through the remaining months of 1792. Little was accomplished by Iroquois delegations to the western tribes. Meanwhile, the United States readied itself for war while, at the same time, it offered a peace proposal to the western Indians (ibid.:180-181).

In August and September, 1792, a general Indian council was held on the Wabash, bringing the western Indians and the Iroquois together. The council's purpose was to formulate a united response to the peace overtures of the Americans. The Indians' reply was delivered to the American agent to the Iroquois, General Israel Chapin, the following November. The Indians demanded that the lands north of the Ohio River be given up by the United States. A council was to take place at Sandusky to finalize any agreement (Downes 1940:320 322; Phillips 1966:183).

The United States appointed three commissioners to attend the Sandusky conference: Timothy Pickering, Benjamin Lincoln, and Beverly Randolph. However, the commissioners were not permitted to meet the Indians at the treaty site. Instead, they were forced to speak to envoys of the tribes who conveyed an unyielding message regarding the demand that the United States relinquish the lands north of the Ohio.

Pickering answered that the United States was willing to make liberal concessions in the stipulations of the Fort Harmar treaty, conceded that the United States had erred in asserting that it had absolute rights to the territory east of the Mississippi, and was prepared to offer compensation for the lands the Indians had lost (Horsman 1967:98; American State Papers-Indian Affairs 1832:1, 346, 359). But he would not agree to the Ohio boundary. There were already Americans living north of the line who had settled there "in good faith" (Phillips 1966:190), he argued.

> The final reply of the Indians was delivered on August 16.
>
> We desire you to consider Brothers, that our only demand is the peaceable possession of a small part of our once great Country--Look back & view the lands, from whence we have been driven, to this spot:--We can retreat no further; because the Country behind, hardly affords food for its present inhabitants; and we have therefore resolved to leave our bones, in this, small space, to which we are not

> confin'd (Commissioners, Journal, August 16, 1793, cited in Phillips 1966:191)

With their backs against the wall, the Indians on the Ohio would go to war. General Anthony Wayne began his preparations for the American military response.

On October 8, 1793, a council was held at the Onondaga village at Buffalo Creek. Present were the Six Nations, minus the Mohawks, "their confederates" from the Ohio, John Butler, representing the British, and Israel Chapin, United States Superintendent of Indian Affairs. The western Indians appealed to the Six Nations to join them in their war against the Americans.

> Brothers: The ancient confederacy which subsisted between us and the Five Nations, was, that, if any of the Five Nations were in distress, we would take them to us; we now see that you are in distress; that you are surrounded by water, and have not dry land to stand upon; that a large white beast stands with open mouth on the other side, ready to destroy you. We have dry land for you to stand on; and we now take you by the hand, and invite you to come, and bring your beds, and sit down with us (American State Papers-Indian Affairs 1832:1, 477).

The Six Nations refused to commit themselves, declaring that they would discuss the issue in council. "[A]s soon as we get to our seats," the Iroquois replied, "and call our agent, appointed by the United States to meet with us... [we] will have our determination communicated to Congress" (ibid.:478).

Two days later, the Mohawk chief Joseph Brant provided the Six Nations' view of what would be the next step. Brant asserted that land was central to the problems that existed between the Iroquois and the United States. "[C]laims upon our lands always have been, and still continue to be, the cause of war" (ibid.). His proposal to resolve the issue, however, was different from that of the western Indians.

> Brothers: We will now proceed to explain the line (of demarcation] upon which we hope peace will be made. We know that the lands along the Ohio are claimed by the Indians, but we propose to give up such part of those lands as are actually settled and improved [by whites]; which settlements are to be circumscribed by a line drawn round the, and no further claims are to be admitted beyond such line. The remainder of the boundary [is] to be explained by General Chapin, for which purpose it is the general wish of the Six Nations that General Chapin will himself, proceed with this speech to Congress (ibid.).

Chapin delivered the Iroquois' message to Secretary of War Knox, and urged that a council be called to address the new proposal. The government's reply, made to the "Sachems, Chiefs, and Warriors, of the Six Nations," was delivered by Israel Chapin in February at Buffalo Creek. However, rather than address directly the Iroquois proposal, the president's message simply reported that he had been "induced" to "consider attentively" the Indians' "proposition" to set a new boundary. The president suggested that a council be held at Venango, in western Pennsylvania, the following May, to discuss the offer (ibid.).

The message that Chapin had read to the Indians in council did not meet with their expectations The Six Nations' response came from Brant.

> Brothers: The speech you have brought us, has given us great uneasiness; we are greatly at loss how to act; we expected a direct answer to our proposals of a boundary line; now we are much distressed that you have brought us but half an answer; the kindling [of] a council fire at a distant place, is what we are not prepared to give a reply to (ibid. :480).

Brant continued, telling Chapin that if the United States had accepted the boundary line proposed by the Iroquois, they, in

turn, would have "sent immediately to our Western brethren, who know our sentiments, and we should have attended your council and confirmed it" (ibid.). Brant made the Six Nations' position clear--the chiefs were willing to renounce their alliance with the western Indians only when the boundaries were reset to their satisfaction.

The conference at Venango never happened. The Six Nations refused to meet with federal officials (ibid. :481). British influence on the Indians on the frontier served to frustrate federal attempts to open negotiations and resolve the problem of land boundaries. At the same time, questions arose regarding the fidelity of the important Seneca leader Cornplanter to American interests. At issue was the ownership and control of the Erie Triangle.

The failure over Venango was but the tip of the iceberg. Other concerns of the United States included threats that the British might intervene militarily on the frontier, the accelerated settlement of the Erie Triangle and Presqu' Isle by Pennsylvania in the face of protests by the Iroquois, and the persistent complaints about the Fort Stanwix and Fort Harmar treaties. The status of the Six Nations thus became of pivotal importance to the government in Philadelphia.

On June 12, 1794, Chapin wrote to Secretary of War Knox informing him that the council that was to have been held at Venango had been moved to Buffalo Creek. Chapin told Knox that the Senecas had repudiated the cession of the Erie Triangle and he voiced fears "of the consequences of the attempt to settle Presqu' Isle" by Pennsylvania (American State Papers-Indian Affairs 1832:520).

The council at Buffalo Creek took place on June 18. Present were the principal sachems, chiefs, and warriors of the Six Nations, Chapin, and two interpreters. The Indians immediately raised the issue of land cessions, dismissing the two previous treaties made with the United States. "We pay no attention to what has heretofore been done by Congress," Cornplanter, the Seneca speaker, told Chapin, "their

proceedings we consider as unjust" (ibid. :521). What he was to say next, however, was even more blunt.

> Brother: You know our demands; we ask but for a small piece of land; and we trust, as you are a great man, you can easily grant our request.
>
> Brother: You wish to be a free people in this country, who have come from the other side of the water and settled here; and why should not we, whose forefathers have lived and died here, and always had possession of the country?
>
> Brother: We, the Six Nations, have determined on the boundary we want established, and it is the warriors who now speak. ...
>
> Brother: It is not because that we are afraid of dying that we have been so long trying to bring about a peace. We now call upon you for an answer, as Congress and their commissioners have oftentimes deceived us; and, if these difficulties are not removed, the consequences will be bad (ibid.)

The threats leveled at Chapin by Cornplanter were real. The patience of the Six Nations, especially that of the Senecas, had worn dangerously thin. The United States would have to act quickly and effectively to avoid war.

Aware of the volatility of the situation, the United States had already taken a first step designed to appease the Six Nations while other options were being considered. On June 14, Governor Mifflin of Pennsylvania agreed reluctantly to respect President Washington's order to halt all further surveying and the construction of an "establishment" at Presqu' Isle (ibid. :508-509). However, he also informed Washington of the pressing need to resolve the land issue. The governor's point was reinforced by his submission of a series of depositions that underscored the urgency of his request, all suggesting that the Six Nations "have determined upon joining our enemies," and that there was an immediate danger of Indian attacks on the frontier (ibid. :509-511).

Chapin continued to meet with the Six Nations, determined to avoid war. In two reports to Secretary Knox, Chapin detailed the problems faced by the federal government and Pennsylvania, and offered his recommendation.

> "Although the minds of the Six Nations are much disturbed at the injuries which they say they have sustained, they are still opposed to war, and wish, if possible, to live in peace with the United States. They are much opposed to the establishing of garrisons in this quarter [the Erie Triangle], as they think it will involve them in a war with the hostile Indians. They are likewise displeased at having their lands surveyed, which, they say, were not legally purchased"....
>
> "Their main anxiety is, at present, respecting the settlement at Presq'Isle, as, they say, they have not fairly sold the land; the lines I described to you last winter are strongly adhered to by them, and, if the party at Le Boeuf [in the Erie Triangle] proceed to erect garrisons at Presqu' Isle, it will immediately call the attention of the hostile Indians that way, and would, in a short time, involve the Six Nations in a war which they wish to avoid. They wish to continue in a state of neutrality, if possible" (ibid.:522).

Knox then wrote of Chapin's recommendation.

> In both these letters, sir, General Chapin urges the appointment of commissioners, who may treat on behalf of the United States and Pennsylvania, with the Six Nations; and he is of opinion, that such an appointment would answer valuable purposes (ibid.).

Responding swiftly to Chapin's recommendation, the president directed that a treaty be held with the Six Nations at Canandaigua, located in western New York, in September, 1794. The sole United States commissioner appointed was Timothy Pickering.

"The great object of the treaty," Pickering would write on November 20, 1794, "/like all other Indian treaties/ was to remove complaints respecting lands" (Pickering Papers 62:108). Although the tracts in question were those of immediate concern to the Senecas, "it was natural that an object so important to one should interest the whole" (ibid.). The treaty would also serve to "renew and confirm the friendship which had now for some years subsisted between the Six Nations and the United States" (Pickering Papers 60:218).

Pickering and his entourage, which included General Israel Chapin, who was to assist Pickering, and three Quakers, who were there at the request of the Senecas, reached Canandaigua on September 19. On September 20, Pickering received the first word of General Wayne's victory over the western Indians at Fallen Timbers. The Indians at Buffalo Creek had also been told of the battle by the British at Fort Erie, who depicted it, however, as a defeat for the Americans (Pickering Papers 60:201 202). In both cases, the reports on the fighting were fragmentary.

The Oneidas were the first of the Indians to arrive at Canandaigua. Pickering met informally with them to learn of their complaints about land swindles by private speculators and the state of New York. He promised to meet with the them at the conclusion of the treaty and advise them on the management of their lands.

"[T]he principal Indian Chiefs from Buffaloe Creek, with a train of near 500 men, women & children," arrived at Canandaigua on October 14 (ibid.:204). An additional 400 Indians were expected. By October 17, the day before the council opened, more than 1500 Indians had assembled to begin the deliberations (ibid.; Savery 1794). All of the principal civil chiefs and war chiefs, with the exception of Joseph Brant, were in attendance. The only Mohawk reported to be present was Henry Young Brant, who told Pickering: "I come forward in behalf of the Mohawks--to see--but not to speak in public" (Pickering Papers 62:100) Later, Pickering would comment on the absence of the Mohawks at the treaty. "As one of the

united Six Nations I did not think it proper to name it as not included in the treaty; nor to omit it by enumerating only the other five For general concerns, I consider the whole Six as forming one confederate nation" (ibid. :108).

The council was formally convened on the afternoon of October 18 (Savery 1794, October 18). The first few days were taken up with treaty protocol. Condolences were held so that "all might be cleared out of the way before the Business of the treaty commenced" (ibid.). Although there were many private meetings with the Indians, Pickering would not get to the main purpose of the conference for several more days. "Various accidents have retarded the business of the treaty," he reported, "among others, the death of two Oneida Chiefs--they were very old men. And the appearance of William Johnson, the British interpreter, occasioned the loss of two days" (Pickering Papers 60:205).

On October 27, further word on the events at Fallen Timbers reached the gathering at Canandaigua. It became clear that the American army under General Anthony Wayne had won a significant victory over the western Indians, effectively removing them as a threat on the frontier and to the designs of the United States in realizing its Indian policy (Downes 1940:335-336; Horsman 1967:99). Both sides at the Canandaigua treaty reacted to the news.

> The Ind^{s} appear cautious of Letting out the particulars, perhaps considering that if any Capital Loss has been sustained on the Ind^{s} Side, it might operate to their disadvantage at this Critical period of the Treaty" (Savery 1794, October 27).

Pickering, however, was fully informed of what had occurred at Fallen Timbers (Pickering Papers 60:205). If there was an advantage to be had, it was his. Now that the confederacy of western Indians had been defeated and was no longer a threat to the United States, the Six Nations were left isolated and essentially defenseless in the face of any demands that Pickering might choose to make. Nevertheless, Pickering's primary objective was to resolve the land issues brought about by the

Fort Stanwix and Fort Harmar treaties, thus addressing directly the long standing complaints of the Six Nations. He had no intention of pressing for undue concessions from the Indians on behalf of the United States, victor or not. It was Pickering, after all, who had told the chiefs in council at Canandaigua: "you know I candidly and Explicitly disapproved of the Conduct of the Commissioners at Fort Stanwix" (Savery 1794, November 9; see also Downes 1940:323; Horsman 1967:98, cf. 100).

Pickering presented his terms to the assembled Indians. He began by repeating the boundaries of the Fort Stanwix and Fort Harmar treaties, and he reminded the Indians of their conveyance of the Erie Triangle (Pickering Papers 62:95). Negotiations continued, although it soon became apparent that the Seneca war chief Cornplanter was intent on blocking any settlement.

"Yesterday many of the Chiefs & warriors were very uneasy at Cornplanter," reported the Quaker observer, William Savery. There were a number of meetings, where Cornplanter was apparently upbraided. One of the sachems "Spoke roughly to him [Cornplanter], [and] told him he should consider who he was that he was only a war Chief & it did not become him to be so forward as he appeared to be it was the Business of the Sachems, more than his to Conduct the Business of the Treaty" (Savery 1794, October 28).

Cornplanter complained that he had taken "a great deal of pains for the good of the Nation but if they had no farther Occasion for him, he would Return home" (ibid.). Pickering then intervened, recognizing that the treaty would be less compelling if Cornplanter was not a signatory. Arguing that he had invited Cornplanter's criticism, Pickering was able to assuage the chiefs and convince Cornplanter to remain.

Soon afterwards, Pickering "produced his Commission with full power to propose & adjust the accomodation of all Differences between them [the Six Nations] & the Und States" (ibid.) Pickering proposed to cede all of the land situated between the east line of the Erie Triangle and the

north-south line running from Buffalo Creek. Pickering would also grant to the Six Nations the right to hunt on the lands ceded by the Fort Stanwix treaty and "all other lands ceded by them since the peace" (Savery 1794, October 28). Finally, he assured the Six Nations that their settlements "shall remain Undisturbed," and that they would receive a $4500 annuity "for Ever" (ibid.).

After considering Pickering's offers, and having worked out several points of contention, the chiefs agreed to the treaty Pickering summarized its highlights in a letter to Secretary of War Knox:

> I have the pleasure to inform you, that yesterday [November 11, 1794] Peace and Friendship with the Six Nations were established; I hope for perpetuity; and on terms which may prove acceptable to the President & Senate....
>
> The fear of offending the British on one hand, & the Western Indians on the other, induced the Chiefs to persist in their opposition to an explicit cession of land; tho' finally they said they were willing to declare that they would never claim any of the land which we were solicitous to have relinquished. On this ground the treaty has assumed its present form....
>
> You will see the great object is obtained; an express renunciation which takes in all the lands in Pennsylvania, including the Triangle which comprehends Presqu' Isle; and a pointed declaration that they will never disturb the people of the U.States in the free use and enjoyment of them or any other lands not contained within the present described boundaries of the lands of the Six Nations (Pickering Papers 60:208).

The Canandaigua treaty, consisting of seven articles, was submitted to the Senate on January 2, 1795, under the heading: "The Six Nations, and Oneida, Tuscarora, and

Stockbridge Tribes" (American State Papers Indian Affairs 1832:544). Thus, the "Six Nations" was clearly a reference to the four hostile tribes: the Senecas, Cayugas, Onondagas, and the Mohawks, the Mohawks not having attended the council at Canandaigua or signed the treaty. The treaty is officially designated: "A Treaty between the United States of America, and the Tribes of Indians called the Six Nations" (7 Stat. 44, see Kappler 1904:34-37).

The preamble sets out the central purpose of the treaty: To remove "all causes of complaint, and establishing a firm and permanent friendship with them [the Six Nations]" (7 Stat. 44). Throughout the 1790s, the Iroquois tribes had repeatedly been told by the United States that their lands were secure and protected by the United States under the provisions of the Indian Nonintercourse Acts. Yet problems over land had arisen, requiring specific and unequivocal redress by the United States.

Article I of the treaty states: "Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations" (7 Stat. 44).

In Article II, the United States agreed unconditionally to acknowledge "the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New-York, and called their reservations, to be their property; and the United States will never claim the same, *nor disturb them or either of the Six Nations*, nor their Indian friends residing thereon and united with them, *in the free use and enjoyment thereof* (7 Stat. 44, emphasis added).

Article III deals with the status of Seneca lands. However, it too provides the same unconditional guarantee: "[T]he United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, *in the free use and enjoyment thereof*" (7 Stat. 44, emphasis added).

Again, in Article IV, identical guarantees to land are granted by the United States. "The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, *nor to disturb them, or any of the Six Nations ... in the free use and enjoyment thereof* (7 Stat. 44, emphasis added).

In turn, the Six Nations agreed to never claim "any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the *free use and enjoyment thereof* (7 Stat. 44, emphasis added).

The clear intention of the United States was to resolve, once and for all, the long-standing disagreements with the Six Nations over land. The strength of this intention is evident by the plain and unconditional confirmation by the United States of the Six Nations' reserved lands. It is important to recognize, however, that this confirmation was fundamentally a reaffirmation of what Pickering had steadfastly believed to be proper and just. He had long been on record as critical of the harsh provisions of the Fort Stanwix and Fort Harmar treaties, and the appropriation of Six Nations land.

In addition, there is an unmistakable *quid pro quo* reflected in the treaty, where the Six Nations agrees never to claim any of the lands outside their boundaries, nor to ever disturb the people of the United States in "the free use and enjoyment thereof" (7 Stat. 44) The use of identical language in the articles, that sets out these guarantees, is significant. It demonstrates explicitly the equal standing of the two parties.

Pickering provides a candid explanation of his objectives at Canandaigua in his response to a letter from Chief Joseph Brant one week after the signing of the treaty.

> I did not come here [Canandaigua] *to drive a bargain*; but to manifest the real desires of the United States to live in friendship with the Six Nations. I therefore did not consider *how much I could gain for the United States*; but, as far as circumstances

> would permit, *how I should promote the true interests of the Six Nations*. In thus consulting their interests, I expected to give them satisfaction: and I am not disappointed (Pickering Papers 60:211-212).

The language of the Canandaigua treaty is unique when compared to other federal treaties of the period. That is, the phrase "in the free use and enjoyment thereof," applied to the conditions under which the Six Nations held their lands, does not appear in any other treaty. Specifically examined was the treaty period from 1778 to 1817. The first federal treaty was with Delawares in 1778, in which the Indians were guaranteed "all their territorial rights in the fullest and most ample manner" (Kappler 1904:4). Subsequent treaties provided other guarantees, none of these identical to those stipulated in the Canandaigua treaty. For example, commonly found provisions include: "shall be secured in the possession of the lands in which they are settled" (ibid.. 5); allotted lands to be used "to live and hunt on" (7, 12, 14, 17); "The United States solemnly guarantee to the Creek Nation, all their lands within the limits of the United States" (27); "The United States solemnly guarantee to the Cherokee nation, all their lands not hereby ceded" (30); "the United States will protect all the said Indian tribes in the quiet enjoyment of their lands" (42); lands are "reserved" (45); the United States will "never interrupt the said tribes in the possession of the lands which they rightfully claim...will...protect them in the quiet enjoyment of the same" (75); the United States will "guarantee...the integrity of all their territory" (108); and often, "The undersigned chiefs and warriors, for themselves and their said tribe, do hereby acknowledged themselves to be under the protection of the United States of America, and of no other nation, power, or sovereign, whatsoever" (cf. 112-116).

Summary

1. The 1783 Treaty of Paris, ending the Revolutionary War, was silent regarding Loyalist Indians. As a consequence, it was necessary for the United States to enter into treaties with the hostile tribes so that their status could be resolved.

2. The 1784 Fort Stanwix treaty with the Six Nations forced a surrender of their lands west of a line of cession running generally south from about Fort Niagara to the Pennsylvania border, including their claims to lands in the Ohio Valley. The Indians in the Ohio Valley ceded most of their lands in the Fort McIntosh treaty the following year.

3. Complaints by the Six Nations and the western Indians regarding the loss of their lands and the boundary set in the Ohio Valley, compelled the United States to conclude the Fort Harmar treaty. However, this treaty was little more than a confirmation of the Fort Stanwix treaty. Complaints about land by the Six Nations, especially the Senecas, continued, along with warfare with the hostile Indians in the Ohio Valley.

4. As a result of Indian complaints and the inability of the United States to pacify and secure the western lands, President Washington appointed Timothy Pickering as Indian Commissioner. He was to resolve the disputes over land and seek to maintain the neutrality of the Six Nations.

5. Conferences at Tioga Point (1790), Newtown Point (1791), and Philadelphia (1792) succeeded in preserving Six Nations neutrality. The United States, however, suffered military defeats in the Ohio Valley, leaving matters there unsettled and threatening. The Six Nations were informed about the Indian Nonintercourse Act and the protection it afforded their lands.

6. At the Philadelphia conference, Pickering suggested that the Six Nations shift their economy to one based on farming as one way to insure their survival. He acknowledged that this would require the Indian tribes to possess absolute and unconditional rights regarding the use of their lands: that is, the "separate occupancy" and "enjoyment of land" that was the "exclusive property" of the Indian tribes.

7. Throughout this period, Pickering freely admitted that the United States, through the Fort Stanwix and Fort Harmar treaties, had exacted an unreasonable price in lands from

the Six Nations. His frequently stated intentions were to remove complaints concerning Indian lands, and to accomplish this task with equity and honor.

8. A failed conference at Sandusky with the western Indians, and another at Venango with the Six Nations, led to the calling of a conference at Canandaigua in the fall of 1794.

9. The council at Canandaigua was convened for the express purpose to settle the disputes over land that had persisted for a decade between the United States and the tribes of the Six Nations. Pickering's clear intention was to extinguish any claims the Six Nations had to all lands outside the borders of those the United States acknowledged as their property. In return, Pickering guaranteed the Six Nations the unqualified and unrestricted use and enjoyment of those lands reserved to them. No other treaty between the United States and Indian people provides such a pledge.

The Canandaigua treaty was, without doubt, a treaty between sovereigns. The treaty's language is clear and unambiguous regarding this fact. The United States viewed the tribes of the Six Nations in precisely the same way it wished the Six Nations to view it. Thus, the phrase, "the free use and enjoyment thereof," is used to describe both the guarantees the United States gave the tribes of the Six Nations in respect to their lands, and in turn, those given by the Six Nations to the United States in regard to its territory.

Finally, after ten years of meetings and negotiations, the United States secured a pemanent peace with the tribes of the Six Nations. The guarantees the treaty provides in respect to Six Nations lands are unequivocal and forthright: to leave the tribes of the Six Nations undisturbed on their lands, so that they may exercise the free use and enjoyment thereof.

References Cited

American State Papers-Indian Affairs
1832 American State Papers. Documents, Legislative and Executive, of the Congress of the United States. Class II. Indian Affairs, Vol. 1. Washington.

Campisi, Jack
1988 From Stanwix to Canandaigua: National Policy, States' Rights, and Indian Land. Pp. 49-66 in Iroquois Land Claims. Christopher Vecsey and William A. Starna, eds. Syracuse: Syracuse University Press

Downes, Randolph C.
1940 Council Fires on the Upper Ohio. Pittsburgh: University of Pittsburgh Press

Graymont, Barbara
1972 The Iroquois in the American Revolution. Syracuse: Syracuse University Press

Horsman, Reginald
1967 Expansion and American Indian Policy, 1783-1812. Norman: University of Oklahoma Press

Jones, Dorothy V
1982 License for Empire: Colonialism by Treaty in Early America. Chicago: University of Chicago Press.

Kappler, Charles J., comp.
1904 Indian Affairs: Laws and Treaties. Vol. II, Treaties. U.S. Government Printing Office.

Phillips, Edward Hake
1966 Timothy Pickering at His Best: Indian Commissioner, 1790-1794. *Essex Institute Historical Collections* 102(3) :163-202.

Pickering Papers
1966 The Timothy Pickering Papers, Vols. 60 and 62. Frederick S. Allis, Jr., ed. The Massachusetts Historical Society: Boston.

Savery, William
1794 The Journal of William Savery. Quaker Collection. Haverford College. Haverford, PA.

Wallace, Anthony F. C.
1972 The Death and Rebirth of the Seneca. New York: Vintage Books.